How Confidential Are Federal Sector Employment-Related Dispute Mediations?

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Alternative dispute resolution (ADR) scholars consider confidentiality to be one of the most important ingredients in effective mediation.[1] Parties are willing to discuss their respective interests candidly only if doing so will not injure their positions should the mediation fail and they find themselves back in the judicial process. Apparently recognizing both the economic gains mediation offers and the importance of confidentiality in the mediation process, lawmakers enacted the Administrative Dispute Resolution Act (ADRA),[2] which by federal statute guards confidentiality in certain types of mediations.

Interestingly, the promise—now a statutory promise—of confidentiality on which mediation is based is potentially at odds with a long standing right accorded federal and private sector labor unions. Federal labor laws governing private and public employers grant unions, in general terms, a right to have a representative present when an aggrieved employee talks with a representative of management about his grievance.[3] Neither the National Labor Relations Act[4] nor the Federal Service Labor-Management

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[1] *See, e.g.*, William F. Baron, *High-Tech/High Resolution: ADR in Technology Disputes*, DISP. RESOL. J., Apr.-Sept. 1996, at 88, 90; Morton Denlow, *Mediating Commercial Disputes: A Useful Tool for Trial Lawyers and Clients*, DISP. RESOL. J., Oct.-Dec. 1995, at 79, 82; Jerry Spolter, *Checklist for Successful Mediation*, DISP. RESOL. J., Mar. 1994, at 26, 29; Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 443-446 (1984).

[2] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) (ADRA of 1996) makes permanent the ADRA of 1990, 5 U.S.C. § 571 (1994), as amended by the Administrative Procedure Technical Amendments Act of 1991, 5 U.S.C. § 582 (1994).

[3] *See* 5 U.S.C. § 7114(a)(2)(A) (1994) (Federal Service Labor-Management Relations Statute, governing public sector labor relations); 29 U.S.C. § 159(a) (1994) (section 9(a) of the National Labor Relations Act, governing private sector labor relations).

[4] 29 U.S.C. §§ 151-169 (1994).

Relations Statute (FSLMRS)[5] states an exception for grievance discussions that take place in the context of a mediation. Moreover, in the public sector, Federal Labor Relations Authority (Authority) precedent holds that a third party, such as a mediator, acting at the behest of the employer is an extension of the employer for purposes of determining whether the union is entitled to be present during discussions between the third party and employees.

The upshot is, whereas mediation promises to be an effective and efficient way for employers and employees to work out their differences without diverting substantial resources to lawyers and litigation expenses, the very aspect of mediation that allows it to work—confidentiality—may be defeated by the union's right to be present during grievance discussions.

The topic discussed in this Article should be of interest to labor and employment lawyers, particularly those in the federal sector. In the world of federal employment, agencies have been directed to implement ADR programs, and several agencies have been using ADR for some years already. As federal agencies continue implementing the requirements of the ADRA, more and more of them will likely turn to mediation as a way to resolve employment-related disputes. At the same time, and in inverse relation to unionism in the private sector, public sector labor unions are growing in numbers.[6] The current state of the law, although decipherable, is certainly subject to debate. It would therefore behoove practitioners and adjudicators alike to think about a uniform way to reconcile the competing interests in this debate earlier rather than later in the evolution of ADR.

I. INTRODUCTION

In recent years the federal government, and the United States Air Force in particular, has increased the emphasis placed on resolving all manner of employment-related disputes by using some alternative to litigation in the courts.[7] As the amount of litigation increases,[8] federal agency officials are

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[5] 5 U.S.C. §§ 7101-7135 (1994).

[6] *See* Martin H. Malin, *Foreword: Labor Arbitration Thirty Years After the* Steelworkers Trilogy, 66 CHI.-KENT L. REV. 551, 562 & n.65 (1990); Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531, 547 (1990); Trina Jones, Note, *Collective Bargaining in the Federal Public Sector: Disclosing Employee Names and Addresses Under Exemption 6 of the Freedom of Information Act*, 89 MICH. L. REV. 980, 983 (1991).

[7] *See generally* U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD 97-157, REPORT TO THE CHAIRMAN, HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,

looking toward ADR methods to avoid time-consuming and costly litigation. Mediation is the ADR method most widely and successfully used by the Air Force. The Air Force mediation model focuses on interest-based negotiations during which the parties are encouraged to candidly discuss their respective points of view and given assurances they may do so without hurting their positions because their discussions will remain confidential. The Air Force's experience using mediation to resolve workplace discrimination allegations is still in its infancy, but preliminary data indicates the use of mediation not only saves money, the nature of the process also improves the working relationship between the parties and helps diffuse the adversarial atmosphere that usually develops when a workplace dispute ends up dividing workplaces into opposing camps that are forced by the process to choose sides.

The Air Force's decision to increase the use of mediation in employment-related disputes seems to be welcomed by agency managers and disgruntled employees. The only potential critics of mediation are the federal labor unions. The Federal Service Labor-Management Relations Statute gives the bargaining unit's exclusive representative—the union—a right to be present at all formal discussions between management and bargaining unit members regarding employee grievances and working conditions.[9] According to rulings by the courts and the Federal Labor Relations Authority, in at least a half dozen cases predating the agency's increased use of mediation, the mediation model used by the Air Force to try to resolve discrimination complaints involved "[f]ormal discussion . . . concerning any grievances or any personnel policy or

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SUBCOMMITTEE ON CIVIL SERVICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 12 (1997).

[8] *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPARTMENT OF LABOR, REPORT AND RECOMMENDATIONS 25 (1994) [hereinafter COMMISSION REPORT].

> [E]mployment litigation has spiraled in the last two decades. The expansion of federal and state discrimination laws and the growth in common law and statutory protection . . . have provided employees with a broader array of tools with which to challenge employer behavior in court. In the federal courts alone, the number of suits filed concerning employment grievances grew over 400 percent in the last two decades. Complaints lodged with administrative agencies have risen at a similar rate . . . .

Id.

[9] *See* 5 U.S.C. § 7114(a)(2)(A) (1994).

practices or other general condition"[10] of employment for bargaining unit members, and therefore entitled the union to have a representative attend all such discussions. A conflict arises between the union's rights and a complainant's rights when participants in a mediation wish to keep matters discussed during the mediation confidential.

Mediation works because strict confidentiality protections allow the parties to discuss their respective concerns candidly, allowing the mediator to assist parties in resolving their disputes according to their respective interests, rather than entrenched legal positions, which, incidentally, routinely are not the same.[11] Opposing the confidentiality guarantees that are essential to effective mediation is the union's statutory right to be present at all formal discussions of employee "grievances or any personnel policy or practices or other general condition of employment"[12] of members of the bargaining unit. Simply stated, effective mediation depends on confidentiality, but the union, citing 5 U.S.C. § 7114(a)(2)(A), may not be excluded from such "discussions."[13]

In many instances, there may be no actual conflict since a complainant is free to choose a union member, acting either individually or on behalf of the union, as his representative during the processing of discrimination complaints.[14] In other cases, however, the complainant may wish to keep matters discussed during settlement or conciliation conferences (mediation by other terms) private and may not want such matters disclosed to the union or to anyone else.[15] In those cases the conflict is threefold. First, a statutory conflict exists between the Privacy Act[16] and the Administrative Dispute Resolution Act on the one hand, and the Federal Service Labor-Management Relations Statute on the other. Second, a policy-oriented conflict exists between the privacy interest of discriminatees and the institutional interest of the union in being afforded an opportunity effectively to represent the bargaining unit. Third, another policy-oriented conflict exists between the interest of labor unions in general and the public

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[10] *Id.*

[11] *See infra* notes 24, 25 and accompanying discussion of "interest-based" negotiations.

[12] 5 U.S.C. § 7114(a)(2)(A).

[13] *See id.*

[14] *See, e.g.*, 29 C.F.R. § 1614.605(a) (1998).

[15] *See, e.g.*, National Air Traffic Controllers Ass'n, 51 F.L.R.A. 115 (1995) (discussing an employee's refusal to allow an agency to release a copy of the written settlement of EEO allegations to the union).

[16] 5 U.S.C. § 552a (1994).

interest in favor of finding more efficient alternatives to litigation when resolving employment-related disputes.

II. AIR FORCE MEDIATION MODEL

Of the various ADR methods,[17] mediation is the ADR technique being used most widely in government and private industry,[18] and the one that

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[17] The General Accounting Office reported that the five predominant ADR methods being used by the federal government and private industry were as follows:

> [1] Ombudsman: A neutral third party designated by an organization to assist a complainant in resolving a conflict. An ombudsman provides confidential counseling, develops factual information, and attempts conciliation between disputing parties. The power of the ombudsman lies in his or her ability to persuade the parties to accept his or her recommendations. Ombudsmen are also called advisors; [2] Mediation: A process in which a trained neutral third party helps disputants negotiate a mutually agreeable settlement. The mediator has no authority and does not render a decision but may suggest some substantive options to encourage the parties to expand the range of possible resolutions under consideration. Any decision must be reached by the parties themselves; [3] Peer Review: A panel of employees (or employees and managers) who review evidence and listen to the parties' arguments to decide an issue in dispute. Peer review panel members are trained in the handling of sensitive issues. The panel's decision may or may not be binding on the parties; [4] Management Review Boards: Similar to peer review, a panel of managers who review evidence and listen to the parties' arguments to decide an issue in dispute. Board members are trained in the handling of sensitive issues. The decision of the board may or may not be binding on the parties. Also called dispute resolution boards; [5] Arbitration: An adjudicatory process in which a neutral third party is empowered to decide disputed issues after hearing evidence and arguments from the parties. The arbitrator's decision may be binding on the parties either through agreement or operation of law. Arbitration may be voluntary (*i.e.*, where the parties agree to use it), or it may be mandatory and the exclusive means available for handling certain disputes.

U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 12.

[18] *See id.* at 16.

> [U.S. General Accounting Office's (GAO's)] 1995 report showed that of the private firms using ADR in 1994, about 80 percent used mediation, about 39 percent used peer review panels, and about 19 percent used arbitration. But according to both EEOC's 1994 and 1996 surveys, most federal agencies using ADR made only one technique available: mediation.

Id.

has been considered particularly useful[19] in employment discrimination cases.[20] The Justice Center of Atlanta[21] defines mediation as follows:

> Mediation is a dispute resolution process which is non-adversarial in nature. It seeks not to declare winners or losers, but to find reconciliation between disputing parties. This process is provided through the skills of a trained mediator. Its focus is the mutually satisfactory resolution of disputes, i.e., satisfactory to all disputing parties. No third party acts as judge and jury. The parties themselves arrive at what each of them agrees is justice—or at least the best available resolution—through the mediation process.[22]

Mediation engenders interest-based, as opposed to position-based negotiations.[23] Interest-based dispute resolution rests on the following notion:

> Traditional methods of dispute resolution do not always get at the real or underlying issues involved between disputants and that traditional methods of dispute resolution—lawsuits in the private sector, formal administrative redress procedures in the federal sector—are predominately position-based. Simply stated, each disputant stakes out a position—such as a

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[19] *See id.*

[20] *See id.* at 17.

> Among three of the four federal agencies we studied with experience in mediation, the limited data available suggested that mediation was more useful than the traditional processes for resolving discrimination complaints. For example, data from the Postal Service's Southern California EEO Processing Center showed that from fiscal year 1988 to fiscal year 1996, about 94 percent of the informal cases that were mediated were settled, compared with 57 percent of those that went through traditional counseling.

Id.; *see also* Cindy Cole Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment Related Disputes*, 26 U. MEM. L. REV. 1131, 1135 (1996) ("The use of mediation is increasing. The American Arbitration Association (AAA) conducted 7,161 mediations in 1991. . . . This number increased from 5,386 in 1990 and 4,801 in 1989. . . . According to national figures, mediation leads to the resolution of a dispute approximately 85% of the time.") (citations omitted).

[21] "The Justice Center of Atlanta is a private, *nonprofit* organization recognized as one of the leading institutions in the United States for the practice and teaching of mediation." U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 16 n.23.

[22] JUSTICE CENTER OF ATLANTA, INC., A MEDIATION MODEL FOR WORKPLACE DISPUTES 3 (3d ed. 1997).

[23] *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 10.

> complaint of discrimination or a defense against a complaint—and hopes to win the case. But interest based dispute resolution . . . focuses on determining the disputants' underlying interests and working to resolve their conflict at a more basic level, perhaps even bringing about a change in the work environment in which their conflicts developed.[24]

Harvard Law Professor Frank Sander, made a similar observation:

> While the adversary method may be ideally suited to the resolution of sharp conflict over factual issues, there are many other problems for which it not so well-suited.
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> . . . Sometimes that process appears to be so cumbersome that it develops a life of its own and loses sight of the underlying problems it was designed to resolve.[25]

As to those underlying problems, Professor Sander observed: "for the ultimate issue is not who hit whom, but rather how this degenerating relationship can be constructively restructured."[26]

Several commentators have echoed Professor Sander's opinion about the advantages mediation has over more traditional means of legal dispute resolution in terms of improving a relationship between parties that will most likely continue to have to work and associate with one another regardless of the outcome of their dispute.[27] It is that very "relationship-

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[24] *Id.* at 10-11.

[25] Symposium, *Current Developments in Judicial Administration: Papers Presented at the Plenary Session of the American Association of Law Schools, December, 1977*, 80 F.R.D. 147, 187 (1977) (remarks of Frank E. A. Sander as commentator).

[26] *Id.*

[27] *See, e.g.*, Ettingoff & Powell, *supra* note 20, at 1140; George Friedman, American Arbitration Ass'n, *A Guide to Mediation and Arbitration for Business People*, *in* INSURANCE COVERAGE LITIGATION: RECOVERY IN THE 1990S AND BEYOND 361, 363 (PLI Litig. & Admin. Practice Course Handbook Series No. H-577, 1998); Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 310 (1970-1971) (describing the ongoing interdependent relationship that exists between an employer and a union as a "bilateral monopoly"); Sandra Marin & Sandra A. Sellers, *Negotiating and Preparing for Successful Dispute Resolution*, *in* ADVANCED SEMINAR ON LICENSING AGREEMENTS 183, 199-200 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G-510, 1998) (discussing benefits of using ADR in the software industry); Wayne N. Outten, *Alternative Dispute Resolution of Employment Disputes*, American Bar Association Center for Continuing Legal Education, Oct. 15-18, 1997, *available in* WESTLAW, ABA-LGLED Database, N97SHCB File.

maintaining" aspect of mediation which makes it so well-suited for resolving workplace discrimination allegations.[28] A 1996 study conducted by the Equal Employment Opportunity Commission (EEOC), Office of Federal Operations concluded "a sizable number of [EEO] disputes . . . may not involve discrimination issues at all. They reflect, rather, basic communications problems in the workplace . . . [which] may be brought into the EEO process as a result of a perception that there is no other forum available to air general workplace concerns."[29]

The Air Force has had a good deal of success using mediation to resolve workplace disputes involving allegations of discrimination.[30] The Air Force follows a mediation model like that taught by the Justice Center of Atlanta and the Federal Mediation and Conciliation Service.[31] A civilian employee who believes he has been discriminated against has, as one option, the right to contact an EEO counselor and communicate his concerns. If the EEO counselor is unable to resolve the matter, he may suggest the parties attempt to mediate.[32] If both the aggrieved employee and the allegedly offending party agree, the case may be referred to mediation, where a third party neutral will attempt to help the parties resolve the dispute.[33]

The Air Force mediation process consists of five general steps. First the mediator introduces himself, discusses his obligation to be impartial, and explains how the process works. Assuming the parties have no objection to the mediator, the second step calls for the parties to take turns making uninterrupted opening statements, during which the mediator and

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[28] *See* U.S. GENERAL ACCOUNTING OFFICE , *supra* note 7, at 11.

[29] *Id.* at 11.

[30] *See id.*

[31] *See id.* at 62. The Federal Mediation and Conciliation Service is an independent agency created under 29 U.S.C. §§ 172, 173 (1994). Its primary function is to settle disputes through conciliation and mediation to limit the disruption of the free flow of commerce caused by labor disputes. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 22.

[32] *See infra* notes 297–298 and accompanying discussion regarding the proposed amendment to 29 C.F.R. § 1614 which would also require an EEO counselor, during the precomplaint interview, to advise aggrieved employees about the opportunity to mediate disputes.

[33] *See* U.S. GENERAL ACCOUNTING OFFICE , *supra* note 7, at 61.

the parties may take notes if they wish.[34] Following opening statements, the mediator facilitates a joint discussion in step three of the process, in which the parties are encouraged to talk openly with one another about their concerns. After the joint discussion, the mediator will hold private discussions, called caucuses, with each party individually. The duration and number of caucuses held during step four depends on the facts and circumstances of each case and how those facts and circumstances are presented to the mediator. The mediator agrees to hold in confidence, within the bounds of the law, all matters discussed during these private caucuses unless the party authorizes the mediator to communicate something discussed in caucus to the other party. After caucusing with each party, the mediator conducts another joint session in the fifth and final step, in which the parties may, if they wish, enter into a written settlement agreement. At the conclusion of the mediation, regardless of the outcome, the mediator tears up his notes in the presence of the parties and requests them to do the same.

Throughout the process, the mediator emphasizes the confidentiality guidelines applicable to matters discussed at various steps in the mediation. The mediator also instructs the parties that if anyone requests that they divulge matters that were confidentially discussed during the mediation they should contact the Air Force Central Labor Law Office for assistance ensuring that certain confidentiality protections under the ADRA are not inadvertently waived.[35]

The mediator's ability to guarantee the parties that matters discussed during caucuses will remain confidential is absolutely essential if the process is expected to work. In addition to the process-oriented justification for guarding confidentiality during mediations, the courts and the Authority accord EEO complainants special privacy rights under the law.[36] Guarding

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[34] The mediator informs the parties at the outset that all notes made by any of the parties during the mediation will be torn up in the company of the other parties and the mediator prior to concluding the mediation.

[35] The Air Force Central Labor Law Office, Rosslyn, Virginia, is the point of contact for defending confidentiality privileges claimed pursuant to the ADRA.

[36] *See* IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019, 1023 (9th Cir. 1983) ("29 C.F.R. § 1613.213(a) prohibits an EEO counselor from revealing the identity of a person consulting him before the person files a formal complaint of discrimination."); National Air Traffic Controllers Ass'n, 51 F.L.R.A. 115, 120-121 (1995); Columbia Typographical Union No. 101, 23 F.L.R.A. 35, 39 n.5 (1986).

those rights has been seen as critical to achieving one of the primary objectives Congress intended to further by passing Title VII of the Civil Rights Act[37]—encouraging voluntary compliance with the Act's requirements.[38] Senator Dirksen, when offering an amendment to Title VII, remarked: "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to public view when a court suit is filed."[39] The regulations governing how EEO complaints are processed set out strict confidentiality provisions that apply during the "informal" stage of complaint processing.[40] The Ninth Circuit Court of Appeals reasoned that "[r]equiring such confidentiality during early stages of an employment discrimination claim serves to facilitate informal resolution of disputes and to encourage employees with discrimination complaints to pursue and explore their claims without fear of retribution."[41]

The idea that guarding the privacy of disputants facilitates early resolution of cases, prior to costly and resource-intensive litigation,[42] has

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> For examples of . . . conflicts in the private sector resolved in favor of the victim of discrimination over the exclusive representative, see . . . *International Union of Electrical, Radio and Machine Workers v. NLRB*, 648 F.2d 18, 26-27 (D.C. Cir. 1980), involving an individual EEO complainant's paramount right to the privacy and confidentiality of his or her EEO complaint over an exclusive *representative's* demand for a copy of the complaint and the employee's identity.

Id.

[37] 42 U.S.C. § 2000e (1994).

[38] *See* 110 CONG. REC. 8193 (1964) (statement of Sen. Dirksen).

[39] *Id.*

[40] *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE NO. 110, at 2-23, 2-25 (1992). Note also that the C.F.R. distinction between "informal" and "formal" complaints has been cited by the courts to mark the point at which a complainant loses his or her right to confidentiality in the complaint process. *See, e.g.*, *Fresno Service Center*, 706 F.2d at 1023 ("29 C.F.R. § 1613.213(a) prohibits an EEO counselor from revealing the identity of a person consulting him *before* the person files a *formal* complaint of discrimination. . . . [T]he EEO counselor . . . was thus prohibited from informing the union that he had scheduled a precomplaint conciliation conference . . . .") (emphasis added) (footnote omitted).

[41] *Fresno Service Center*, 706 F.2d at 1023.

[42] *See* VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW 119 (1993).

been codified in the ADRA.

III. THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

In 1990 Congress, finding that expanding the use of ADR would be a smarter, faster, more efficient way to resolve certain employment-related disputes,[43] passed the Administrative Dispute Resolution Act of 1990. "[The Act] required federal agencies to develop ADR policies, [and] charged the Administrative Conference of the United States (ACUS) with

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> Federal agencies . . . need better and cheaper ways to resolve disputes. . . .
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> Solving . . . disputes can be expensive. It involves high-priced lawyers, it clogs the courts, and it delays action. Each year, 24,000 litigation matters reach the 530 full-time attorneys and 220 support staffers employed by the Labor Department alone. It often takes years to resolve these disputes, postponing the implementation of important programs and preventing a lot of people from doing what they are paid to do.

Id.

[43] *See* H.R. 2497, 101st Cong. § 2 (1990) (enacted).

> The Congress finds that—
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> (1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
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> (2) administrative proceedings have become increasingly marked by formality, costs, and delays often result in unnecessary expenditures of time of individuals and decreased likelihood of achieving consensual resolution of disputes;
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> (3) alternative means of dispute resolution . . . have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
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> (4) such alternative means also lead to more creative, efficient, and sensible outcomes . . . ;
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> (5) such alternative means may be used advantageously in widely varied administrative programs;
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> (6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency power under existing law;
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> (7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and
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> (8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

Id.

(1) assisting agencies in developing ADR policies and (2) compiling information on agencies' use of ADR."[44] Congress passed the ADRA of 1996 to "permanently reauthorize[] the 1990 [A]ct and charge[] the President with" designating a replacement for ACUS to be responsible for "facilitat[ing] and encourag[ing] agency use of ADR."[45] The 1996 Act followed the growing movement to expand the use of ADR[46] in the federal government.[47] The purpose of the ADRA (to encourage the use of ADR in resolving, among others, employment-related, disputes)[48] jibes seamlessly with already existing EEO regulations directing federal agencies to "[m]ake reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints,

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[44] U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 5.

[45] *Id.*

[46] *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, (citing OFFICE OF FEDERAL OPERATIONS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ADR STUDY (1996)); VICE PRESIDENT AL GORE, NATIONAL PERFORMANCE REVIEW, *supra* note 42, at 119.

[47] *See H.R. 4194 Bill Summary & Status for the 104th Congress* (last modified Sept. 26, 1996) <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR04194:@@@D>.

> (Sec. 2) Includes the use of ombuds and binding or nonbinding arbitration among ADR procedures, but excludes settlement negotiations. Repeals the current exclusion and permits parties to use ADR to resolve certain Federal employee-related disputes involving such matters as retirement, life or health insurance, and suspension or removal from duty, as well as prohibited personnel practices.
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> (Sec. 5) Authorizes a Federal agency to use the services and facilities of State, local, and tribal governments for ADR purposes.
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> (Sec. 7) Provides for expedited hiring of neutrals in civilian and defense agency contracts for use in any part of an ADR process.
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> Requires that the President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution. Directs such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, to encourage and facilitate agency use of ADR and develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.
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> Repeals the requirement for the Government to enter into a contract with an individual on a roster of qualified neutrals or a roster maintained by other public or private organizations or individual.

Id.

[48] *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 5.

including the pre-complaint . . . stage"[49] and to "incorporate alternative dispute resolution techniques into their investigative efforts in order to promote the early resolution of complaints."[50]

As applied to disputes concerning allegations of discrimination, the threshold question is whether ADR is appropriate to resolve the particular dispute or controversy in issue. The ADRA directs "[a]n agency . . . [to] consider not using a dispute resolution proceeding" when one or a combination of factors is present,[51] such as the potential precedent-setting aspect of a high profile case.[52]

Under the ADRA, there are essentially four elements of a dispute resolution proceeding.[53] First, the Act covers use of an alternative means of "dispute resolution [process,]"[54] which by definition includes mediation.[55] Second, the process must be employed to resolve "an issue in controversy," the definition of which clearly covers EEO complaints of discrimination (and Merit Systems Protection Board (MSPB) appeals).[56] Third, a neutral will be appointed to serve as "a conciliator, facilitator, or mediator . . . at the will of the parties."[57] The neutral "may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding."[58] In practice, the Air Force will look primarily to officers or civilian employees within the Department of the Air Force to mediate

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[49] 29 C.F.R. § 1614.603 (1998).

[50] 29 C.F.R. § 1614.108(b) (1998).

[51] 5 U.S.C. § 572(b) (1994).

[52] *See* 5 U.S.C. § 572(b)(1).

[53] This entire section discussing the key provisions of the ADRA draws heavily from JOSEPH M. MCDADE, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996: WHAT YOU NEED TO KNOW TO MAKE IT WORK FOR YOU (1997).

[54] 5 U.S.C. § 571(3) (1994).

[55] The term is defined to mean "[a]ny procedure that is used . . . to resolve issues in controversy, including but not limited to . . . conciliation, facilitation, mediation, fact-finding, minitrials, . . . arbitration [and use of ombuds,] or any combination thereof." *Id.*

[56] The term "'issue in controversy' means an issue which is material to a decision concerning an administrative program of an agency, and [when] there is [a] disagreement (A) between an agency and persons who would be substantially affected by the decision; or (B) between persons who would be substantially affected by the decision." 5 U.S.C. § 571(8)(A), (B) (1994 & Supp. II 1996).

[57] 5 U.S.C. § 573(b) (1994).

[58] 5 U.S.C. § 573(a).

disputes. Fourth, the parties who will participate in the process should be clearly identified.[59]

In general terms, under the ADRA only information provided by a party to a neutral in confidence,[60] or information generated by the neutral and provided to the parties in confidence, is protected.[61] The ADRA confidentiality provisions state, with certain exceptions,[62] neither a neutral nor a party shall voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication.[63] As applied to the mediation model used by the Air Force, the ADRA confidentiality rules protect only communications made between the neutral and the respective parties during caucuses. Statements or other

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[59] *See* 5 U.S.C. § 571(10).

[60] *See* 5 U.S.C. § 571(7).

> "[I]n confidence" means, with respect to information, that the information is provided—
>
> (A) with the expressed intent of the source that it not be disclosed; or
>
> (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed . . . .

Id.

[61] *See* 5 U.S.C. § 574(a) (1994).

[62] The exceptions are listed at 5 U.S.C. § 574(a)(1)-(4) and 5 U.S.C. § 574(b)(1)-(7). The exceptions include the following: (1) written consent of all the parties; (2) the communication has already been made public; (3) the communication is required by statute to be made public; (4) a court determines such disclosure is necessary; (5) the communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding; and (6) under certain circumstances, when party or affected nonparty participants fail within 15 days to offer to defend a neutral's refusal to disclose communications in response to a discovery request, any claim of confidentiality under the statute may be waived.

[63] *See* 5 U.S.C. § 574(a), (b) (1994 & Supp. II 1996). Note also that the ADRA confidentiality provisions attach only to "dispute resolution communication[s.]" 5 U.S.C. § 574(a). The following criteria are used to determine whether a communication is protected:

> 1. The oral or written communication occurred between the time a neutral was appointed and specified parties began participating until the termination of the ADR process;
>
> 2. The communication was made for the purposes of the ADR process and was not discoverable before the ADR process began; and
>
> 3. The information was provided by a party to the neutral in confidence or was generated by the neutral and provided to the parties in confidence.

MCDADE, *supra* note 53, at 15 (citations omitted).

communications made during joint sessions are not protected. Additionally, written agreements by the parties to use mediation, or some other form of ADR, and final settlement agreements are specifically excluded from coverage.[64] The confidentiality protections included in the ADRA facilitate early resolution of cases, a goal referred to by Senator Dirksen[65] and specifically stated in the EEOC regulations covering the processing of discrimination complaints in the federal workplace.[66]

The Air Force mediation model is structured so as to meet the elemental requirements for ADRA coverage. First, mediation is specifically referenced as a covered "dispute resolution [process.]"[67] Second, mediation in the context of settling an EEO complaint (or MSPB appeal) between a complainant and the agency, or a representative of the agency, clearly deals with an "issue in controversy" as defined by the statute.[68] Third, as previously mentioned, neutrals will be appointed, usually from within the Air Force, to act as mediators.[69] Finally, the parties to the dispute are clearly identified at the outset of the EEO complaint process. Air Force mediations are covered by the confidentiality provisions of the ADRA.

IV. CLASH BETWEEN 5 U.S.C. § 7114 AND PRIVACY OF COMPLAINANTS

Under the Federal Service Labor-Management Relations Statute, a representative of the union shall be given an opportunity to be represented at "*any formal discussion* between one or more *representatives of the agency* and one or more employees in the unit . . . concerning any

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[64] *See* 5 U.S.C. § 571(5).

[65] *See supra* note 39 and accompanying text.

[66] *See* 29 C.F.R. § 1614.603 (1998) ("Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination . . . .").

[67] 5 U.S.C. § 571(3).

[68] *See supra* note 56 and accompanying statutory definition.

[69] *See supra* notes 58 and accompanying text. By 1997, approximately 1000 Air Force EEO counselors, personnelists, and judge advocates had gone through mediation training, and currently the number is over 1500. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 62. The Air Force also established the "Mediator Mentoring Program, under which trained but inexperienced mediators apprentice with highly skilled and experienced mediators" in order to build a cadre of experienced mediators. *Id.* at 62. Both the mentor and the training mediator are formally appointed according to the third requisite element for ADRA coverage.

grievance or any *personnel policy or practice* or other *general condition of employment.*"[70] The statutory language is filled with words and phrases on which the applicability of the provision to EEO mediation proceedings would appear to turn. The courts' and the Authority's position regarding the applicability of 5 U.S.C. § 7114(a)(2)(A) to settlement discussions has been somewhat less than uniform or predictable.

The Authority's position on whether the union's right to be present at meetings between EEO complainants and agency representatives can best be summarized as a "by the numbers" approach.[71] The Authority applies the statutory language of 5 U.S.C. § 7114(a)(2)(A), as interpreted by case law, to the facts, looking for four elements which, according to the Authority, give rise to the union's representational right.[72] First, there must be a discussion.[73] Second, that discussion must be formal.[74] Third, the discussion must take place between one or more unit employees and management.[75] And fourth, the discussion must concern a grievance or any personnel policy or practice, or other general condition of employment.[76] Although the Authority and the courts appear, in several leading cases, to carve EEO settlement discussions out of the class of cases to which the "by the numbers approach" applies, neither the courts nor the Authority have held as much in a case directly involving an EEO complainant. Prior to taking a close look at the legal and policy-oriented conflicts, it is necessary to trace the meandering precedential route followed by the Authority and the courts during the evolution of the union's 5 U.S.C. § 7114(a)(2)(A) right.

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[70] 5 U.S.C. § 7114(a)(2)(A) (1994) (emphasis added).

[71] See Major Michael D. Drenan, USAF, *Section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute: Formal Discussions, Their Evolution and Expansion*, 35 A.F. L. REV. 169 (1991), for a thorough discussion of 5 U.S.C. § 7114(a)(2)(A), its legislative history, its analytical framework as applied by the circuit courts, and its impact on the attorney-client work product privilege.

[72] *See id.* at 173.

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *See id.*

A. Fresno Service Center

The first noteworthy case in which the Authority and the federal court addressed the conflict between a union's representational right and an individual's right, generally speaking, to keep settlement conferences between herself and her employer confidential was *IRS, Fresno Service Center v. Federal Labor Relations Authority*.[77] In 1979 Edith Calderone, a GS-9 programmer employed by the IRS, was chosen for a position as a programmer analyst trainee. After being informed that she would have to accept a reduction to GS-7 to obtain the job, she contacted Kathryn Biehaalder, union steward and executive vice president of the local chapter of the National Treasury Employees Union (NTEU). Together they contacted the personnel office and were told that the analyst trainee job should be graded a GS-11.[78] At Biehaalder's suggestion, Calderone filed a grievance and an EEO complaint. Biehaalder was designated Calderone's representative and they discussed the complaint process with the agency EEO counselor.[79] The agency EEO counselor handed the case over to Tommy Thompson, agency head EEO officer, who initiated an investigation pursuant to 29 C.F.R. § 1613.213(a). Thompson interviewed Biehaalder and Calderone together, then met with Calderone's supervisor. After speaking with both parties, Thompson suggested all of them meet together to try to resolve the complaint informally.[80] On January 2, 1980, an EEO precomplaint conciliation conference was held between Thompson, Calderone, Biehaalder, and Calderone's supervisor. The complaint was not resolved.[81] The Authority issued a complaint alleging that by conducting the precomplaint conciliation conference, the employer held a formal discussion concerning a grievance or a condition of employment without providing the union an opportunity to be represented at the discussion in violation of 5 U.S.C. § 7114(a)(2)(A) of the FSLMRS.[82] The Administrative Law Judge (ALJ) held that the union had a right to be present because it was a formal discussion about conditions of employment, but that since the local's second vice president, Biehaalder, was present, no

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[77] 706 F.2d 1019 (9th Cir. 1983).

[78] *See id.* at 1021.

[79] *See id.* at 1022.

[80] *See id.*

[81] *See id.*

[82] *See id.*

violation occurred.[83] The Authority disagreed, holding that the union's right to be present at the meeting was based on a right independent of representing Calderone.[84]

The Court of Appeals for the Ninth Circuit reversed the Authority, holding that the union does not have a right under 5 U.S.C. § 7114(a)(2)(A) to be present at an EEO precomplaint conciliation conference.[85] First, the court said the Authority exceeded its authority granted under the Civil Service Reform Act[86] to interpret the law covering collective bargaining by federal employees when it undertook interpreting and applying EEOC regulations:

> The Authority's interpretation of the provisions involved here extends beyond its designated area of responsibility and ventures into discrimination in federal employment, a field Congress explicitly has delegated to the EEOC. . . . While this court may give "considerable" weight to the Authority's interpretation of the Labor-Management Chapter, no such deference is owed to the Authority's reading of an EEOC regulation or to the Authority's resolution of the conflict between the statute and the EEOC regulation.[87]

Next, the court contrasted the public interest in protecting labor organizations and collective bargaining, supporting a union's right to be present at formal discussions, against the privacy right accorded to an EEO complainant under the then applicable Code of Federal Regulations provision governing the processing of EEO complaints.[88] Resolving the conflict in favor of the EEO complainant, the court pointed out that "[r]equiring such confidentiality during early stages of an employment discrimination claim serves to facilitate informal resolution of disputes and to encourage employees with discrimination complaints to pursue and explore their claims without fear of retribution."[89]

The court also looked to the legislative history of Title VII when commenting on the importance of confidentiality in the complaint resolution process, citing the remarks of Senator Dirksen:

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[83] *See id.*

[84] *See id.*

[85] *See id.* at 1023.

[86] 5 U.S.C. § 7101 (1994).

[87] *Fresno Service Center*, 706 F.2d at 1023.

[88] *See id.* (citing 29 C.F.R. § 1613.213(a) (1982)).

[89] *Id.*

> "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to public view when a court suit is filed." 110 Cong. Rec. 8,193 (1964). Although these provisions relate to discrimination in the private sector rather than in federal employment, they illustrate Congress' concern with the confidentiality of EEOC investigations and its belief that such confidentiality is important in achieving voluntary compliance with the goals of Title VII.[90]

Two important factors in *Fresno Service Center* helped the courts and the Authority distinguish *Fresno Service Center* and reduce its applicability in later cases. First, the Ninth Circuit specifically based its finding that the conciliation conference failed to meet 5 U.S.C. § 7114's formality requirement on the wording of 29 C.F.R. § 1613.213.[91] Indeed, the court identified as the "most critical circumstance" the fact that "[t]he meeting was convened by Thompson under the EEOC procedure . . . by which an EEO counselor seeks to resolve discrimination charges in the precomplaint stage on an 'informal basis.' Given that basis and purpose of the meeting, the discussion was informal rather than formal."[92] In sum, reasoned the court, since the EEOC characterizes precomplaint—which is to say conferences taking place prior to the filing of a formal complaint—conciliation as "informal," the Authority should have followed the plain reading of the C.F.R. and found the conference to be an informal discussion.[93]

Second, the collective bargaining agreement (CBA) between the agency and the union explicitly excluded claims of discrimination from the grievance procedure.[94] The court held that the union's interest in being present at formal discussions of grievances was grounded in its responsibility to administer the CBA.[95] Because the CBA excluded complaints like Calderone's from the grievance procedure, the court found the "statutory EEOC procedure" to be a different and distinct mechanism from the negotiated grievance procedure, and one in which the union had

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[90] *Id.* at 1024.

[91] *See id.* at 1023–1024.

[92] *Id.*

[93] *See id.* at 1023.

[94] *See id.* at 1024–1025.

[95] *See id.* at 1024.

no institutional role (applying a separate statutory process approach).[96] "Similarly," held the court, "there is no reason [the union] should have the same rights in the EEOC procedure as it does in the contractual grievance process."[97]

Having found the conciliation conference not to be a formal discussion under 5 U.S.C. § 7114(a)(2)(A), the court declined to address whether the Authority's decision violated the Privacy Act.[98]

B. NTEU v. FLRA

Two years later, in *National Treasury Employees Union v. Federal Labor Relations Authority*,[99] the Court of Appeals for the District of Columbia Circuit held that an agency counsel's interview of a witness prior to a Merit Systems Protection Board hearing was a formal discussion under 5 U.S.C. § 7114(a)(2)(A), entitling the union to have a representative present at the interview.[100] In *NTEU v. FLRA*, James Lewis witnessed an altercation between Phillip Murphy and Murphy's supervisor. Murphy lost his job and appealed his removal to the MSPB, designating the local NTEU to represent him at the MSPB hearing.[101] When preparing for the hearing, the agency attorney, John Maus, interviewed Lewis, who was to appear on Murphy's behalf at the hearing. Maus had Lewis's supervisor contact him and direct him to report to a management office for the interview.[102] The agency did not notify the union or give it an opportunity to be present at the interview. The interview lasted twenty to thirty minutes and was marked by extensive questioning and note taking.[103] The NTEU filed an Unfair Labor

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[96] *Id.* at 1025.

[97] *Id.*

[98] *See id.* at 1024–1025.

[99] 774 F.2d 1181 (D.C. Cir. 1985).

[100] *See id.* at 1192–1193. *NTEU v. FLRA* reversed *Bureau of Government Financial Operations*, 15 F.L.R.A. 423 (1984) (holding that an agency interview of a witness in preparation for a MSPB hearing is not a discussion because it involved a separate statutory process) (supplemental decision and order at 21 F.L.R.A. 69 (1986)), essentially ending the brief interlude during which the Authority followed the "separate statutory process" rationale the Ninth Circuit laid out in *Fresno Service Center*.

[101] *See NTEU v. FLRA*, 774 F.2d at 1183.

[102] *See id.* at 1182.

[103] *See id.* at 1183.

Practice (ULP) charge alleging a violation of its right to be present at what it alleged was a formal discussion under 5 U.S.C. § 7114(a)(2)(A).[104]

The ALJ found that the interview was a formal discussion and that the agency committed a ULP by failing to notify the union.[105] "The [Authority] reversed the ALJ's determination, finding that NTEU had no right to representation because the discussion was neither 'formal' nor concerned 'any grievance or any personnel policy or practices or other general condition of employment.'"[106] The Authority also relied on the Ninth Circuit's separate statutory process approach in *Fresno Service Center*.[107]

The D.C. Circuit rejected the Authority's and the Ninth Circuit's reasoning that "grievances" are only those claims pursued under the negotiated grievance procedure, and therefore that matters like EEOC and MSPB appeals are not covered by 5 U.S.C. § 7114(a)(2)(A).[108] The court found instead the interview did concern a "grievance" according to the plain meaning of the statute. "Nothing in [the] definition [of grievance in 5 U.S.C. § 7103] restricts 'grievance' to matters raised through negotiated procedure. . . . Murphy's appeal to the MSPB thus meets the statutory definition of a grievance as an employee 'complaint' concerning a 'matter relating to [his] employment.'"[109] Having found the interview concerned a grievance, the court had no problem saying the union had a right under 5 U.S.C. § 7114(a)(2)(A) to representation during a discussion of that grievance.[110]

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[104] *See id.*

[105] *See id.* at 1183–1184.

[106] *Id.* at 1184 (alteration in original) (quoting Bureau of Gov't Fin. Operations, 15 F.L.R.A. 423, 431 (1984)).

[107] *See* Bureau of Gov't Fin. Operations, 15 F.L.R.A. at 429.

[108] *See NTEU v. FLRA*, 774 F.2d at 1188.

[109] *Id.* at 1186.

[110] The court pointed out that discussions of personnel policy or *general* conditions of employment entitle the union to be present only if those discussions concern a condition of employment affecting unit employees generally—as opposed to a single person's terms and conditions. *See id.* The court pointed out the word "general" is not included before "grievance" as it is before "conditions of employment" in 5 U.S.C. §7114. *See id.* (citing 124 CONG. REC. 29,184 (1978) (statement of Representative Udall)). Therefore, by contrast, any discussion of a grievance, whether with the individual grievant or with anyone else, entitles the union to be present under 5 U.S.C. § 7114(a)(2)(A). *See id.* at 1189.

The court also rejected the Authority's finding that the interview was not a "formal" discussion.[111] The Authority found the interview not to be formal because no one interviewing Lewis was in his chain of supervision or had direct supervisory responsibilities over him.[112] The Authority also noted that Lewis's presence at the meeting was not mandatory, that there was no clear record evidence that advance notice of the meeting was given to Lewis, and that no formal agenda had been distributed regarding the meeting.[113] The court rejected the Authority's "no advance planning" determination, reasoning "[f]or an attorney and two labor relations specialists to meet . . . and in a single day interview *all* of the witnesses to be called at an MSPB hearing surely indicates some advance preparation."[114] With regard to Lewis's mandatory presence, the court held that when strong indicators of formality are present, "such as the fact that an employee was summoned to a meeting initiated by three management representatives and held on management's terrain," unclear record evidence on the point cannot "carry the day" for management.[115] And finally, the court held erroneous the Authority's finding that the interviewers were not management representatives because they were not in Lewis's chain of supervision, concluding that there was no such requirement under a 5 U.S.C. § 7114(a)(2)(A) analysis.[116]

Several of the Ninth Circuit's conclusions in *Fresno Service Center*, with which the D.C. Circuit disagreed, also merit further discussion. For example, the court disagreed with the Ninth Circuit's "assumption that the union, as the exclusive bargaining representative of unit employees, has no cognizable interest in being represented when a dispute being pursued under a statutory procedure is the subject of a discussion between an employee and an agency representative."[117] On this point the court went on to discuss how remedies to correct statutory wrongs can impact "unit" interests (or spill over) rather than just individual interests, and thereby implicate the very institutional role the Ninth Circuit discounted in *Fresno Service Center*.[118]

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[111] *See id.* at 1193.

[112] *See id.* at 1189.

[113] *See id.* at 1189–1190.

[114] *Id.* at 1190.

[115] *Id.*

[116] *See id.* at 1190–1191.

[117] *Id.* at 1188.

[118] *See id.*

> Remedies for improper employer conduct, such as reinstatement or retroactive seniority, also may affect other bargaining unit employees, since a benefit or opportunity granted to one employee can mean the loss of the same benefit or opportunity for another employee. The impact of these individual complaints on the bargaining unit will be felt regardless of whether the aggrieved employee opts to pursue a negotiated grievance procedure or an alternative statutory procedure. We are therefore reluctant to follow the Ninth Circuit's suggestion in *IRS, Fresno Service Center* that the union's role in protecting the interest of the bargaining unit is inherently restricted to those situations in which an employee pursues a grievance through a negotiated grievance procedure.[119]

The D.C. Circuit's position is that the union's institutional role at discussions is based on the impact of a remedy on the bargaining unit, not on whether the employee chooses a statutory procedure or the negotiated grievance procedure.[120]

> [T]he union's institutional role in these statutory grievance procedures is obviously more restricted than its role in a negotiated grievance procedure. . . . Nonetheless, although the union's institutional role may be restricted, we do not think it necessarily is nonexistent. In the *absence of congressional intent to the contrary* or *any plausible alternative interpretation of the statute by the FLRA*, we find that the words of § 7114(a)(2)(A), which provide that an exclusive representative has the right to be present at *any* formal discussion of a grievance between management and a bargaining unit employee, assure the union a role in the alternative procedures so long as the statutory criteria of § 7114(a)(2)(A) are met.[121]

In the quoted passage above, the D.C. Circuit makes several important points. First, the court correctly points out the principal weakness in the Ninth Circuit's reasoning in *Fresno Service Center*: that in many cases the remedies sought by individual statutory grievants, like reinstatement, retroactive seniority, placement preference,[122] or transfer, will spill over

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[119] *Id.*

[120] *See id.* at 1189.

[121] *Id.* (emphasis added).

[122] *See, e.g.*, Columbia Typographical Union No. 101, 23 F.L.R.A. 35, 35 (1986) (indicating that the EEO complainant wanted, as part of a settlement, priority placement in a particular position).

> The position of Head Deskman-in-Charge is within the bargaining unit represented by the Union and GPO's agreement to promote Ms. Curtis to the next available

into bargaining unit interests whether the employee chooses a statutory procedure, like those governed by EEOC or the MSPB, or the negotiated grievance procedure.[123] The D.C. Circuit then acknowledges that despite the inevitable spillover into union interests, "the union's . . . role . . . is [nonetheless] *obviously* more restricted" in employee statutory procedures than it is in its collective bargaining agent role.[124] The court makes no distinctions about the specific extent to which a union's role will be restricted in relation to which statutory procedure an aggrieved employee pursues, but makes clear that the union's right is *most restricted* in EEO cases.[125] Indeed, the section cited above is followed by a footnote wherein the court explicitly describes how, in discrimination cases, a union's collective interest must yield to the individual interest of a discriminatee complainant:

> This case does not require us to decide what the union's rights would be where an employee opts to pursue a grievance outside of the negotiated grievance procedure because the union thinks that prosecution of this specific grievance is not in the interest of the bargaining unit as a whole. In the present case, Murphy requested NTEU to represent him at the MSPB hearing, and NTEU accepted. *We do note, however, that in the case of grievances arising out of alleged discrimination on the basis of race, religion, sex or national origin, Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) (awarding retroactive seniority to individual employee victims of race discrimination). *Similarly, a direct conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the rights of an*

> vacancy foreseeably results in impact upon the remaining bargaining unit members, as between 200 and 250 unit employees will be rendered ineligible to apply for the next vacancy of Head Deskman-in-Charge which, without posting, will automatically be awarded to Ms. Curtis. Promotion to the Head Deskman-in-Charge position is one of the few opportunities open to journeymen unit employees to move into better paying positions and ultimately to supervisory positions.

Id. at 48.

[123] *See NTEU v. FLRA*, 774 F.2d at 1188.

[124] *Id.* (emphasis added).

[125] *See id.* at 1189 n.12.

employee victim of discrimination should also presumably be resolved in favor of the latter. Cf. IRS, Fresno Service Center, 706 F.2d 1019.[126]

In the footnote, the court essentially says if this were a case wherein an EEO complainant did not want the union present, the individual's interest would prevail over the union's. Having conceded that an individual's interests trump the union's interest in EEO/Title VII cases, the court says the correct test in 5 U.S.C. § 7114(a)(2)(A) cases—by implication in other than EEO cases—is strictly to apply the statutory criteria unless one of two possible alternatives are present.[127] Specifically, the court contemplates that departure from the strict statutory criteria approach may be proper if presented with either "*any plausible alternative interpretation of the statute by the FLRA*," or if presented with "*congressional intent to the contrary*."[128]

Regarding "plausible alternative interpretations of the statute,"[129] the D.C. Circuit had the better argument describing the union's institutional role in grievance discussions based on the potential spillover impact of remedies on the bargaining unit. The interesting point is the court's acknowledgment that, notwithstanding the bargaining unit's interest in being represented during statutory complaint discussions, a bargaining unit's 5 U.S.C. § 7114(a)(2)(A) right may be subordinated to another interest (such as an individual complainant's privacy) based on a finding that Congress intended the individual's interest to be superior.[130] This point becomes critically important when applying *NTEU v. FLRA* to cases arising after 1990, because although there may have been no clearly identifiable congressional intent to subordinate the union's right in such a fashion in 1985, in 1990 with the passage of the ADRA (and its subsequent permanent authorization in 1996), Congress spoke pretty clearly about the confidentiality protections applicable to dispute resolution communications made pursuant to the ADRA.[131] Most notably, Congress did not limit the confidentiality protections applicable to dispute resolution communications

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[126] *Id.* (emphasis added).

[127] *See id.* at 1189.

[128] *Id.* (emphasis added).

[129] *Id.*

[130] *See id.* at 1189 n.12.

[131] *See supra* notes 60-66 and accompanying text discussing the confidentiality provisions of the ADRA.

to Title VII cases, but made them applicable to all such communications taking place pursuant to any dispute resolution process.[132]

The two important points to take away from the D.C. Circuit's holding in *NTEU v. FLRA* are the following: (1) an individual EEO complainant clearly may elect to exclude the union from his settlement discussions with the employer based on footnote 12 of the opinion and (2) other types of statutory complainants arguably may exclude the union from their settlement discussions with the employer based on the confidentiality provisions of the ADRA.

C. Columbia Typographical Union

One year after *NTEU v. FLRA*, the Authority again considered, albeit not directly in the context of a 5 U.S.C. § 7114(a)(2)(A) case, the conflict between an employee's interests in keeping settlement discussions with the employer confidential and the union's representational right in *Columbia Typographical Union No. 101*.[133]

On May 20, 1982, Ms. Sylvan Curtis filed an EEO complaint alleging she had not been chosen for a position she applied for as a result of sexual discrimination. The agency conducted an investigation in accordance with 29 C.F.R. § 1613 and on March 23, 1983, entered a settlement agreement that was signed by the complainant, her representative, and the agency's EEO complaint officer.[134] The settlement provided that Ms. Curtis would be promoted to the next available vacancy of a Head Deskman-in-Charge on any of the three shifts in the section in which she worked.[135] The union was first given notice of the settlement terms in a letter dated March 28, 1983.[136]

The case was not presented as a 5 U.S.C. § 7114(a)(2)(A) violation. Rather, the issue, as framed by the Authority, was a "bypass" or "choice of representation" case, based on an alleged violation of 5 U.S.C. § 7116(a)(1) and (5), in that the agency "negotiat[ed] directly with a bargaining unit employee [during the] informal adjustment of her Equal Employment Opportunity complaint."[137] In his original pleading, the

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[132] *See* 5 U.S.C. § 574(a) (1994 & Supp. II 1996).

[133] 23 F.L.R.A. 35 (1986).

[134] *See id.* at 35–36.

[135] *See id.* at 36.

[136] *See id.* at 45.

[137] *Id.* at 35.

General Counsel alleged that by "negotiat[ing] directly with an employee an Informal Adjustment Agreement to resolve the employee's complaint of discrimination[,] . . . Respondent bypassed the Union and thereby failed or refused to negotiate in good faith with the Union."[138]

Although not specifically considering a 5 U.S.C. § 7114(a)(2)(A) allegation, the ALJ rolled a 5 U.S.C. § 7114(a)(2)(A) analysis into his discussion, noting:

> If construed strictly, one could conclude that the violation found was not encompassed by any allegation of the Complaint since the Complaint was premised on the theory that, because an EEO complaint was a "grievance" within the meaning of § 3(a)(9) of the Statute, the exclusion of the Union from the negotiation of the Adjustment Agreement violated the Statute.[139]

The ALJ went on to opine that "an agency is free to meet with an employee and/or his or her designated representative to resolve, or to attempt to resolve, pursuant to statutory procedures of the EEOC, an EEO complaint of discrimination without notice to the exclusive bargaining representative."[140] Having concluded that holding EEO settlement discussions with a bargaining unit employee without the presence of the exclusive representative would not be a ULP, the ALJ nevertheless concluded:

> "[B]ypass" [as used by the General Counsel in his original complaint] is sufficiently broad as to include all aspects of Respondent's duty to bargain with the Union and specifically that it encompassed Respondent's duty to give notice to the Union of any change of conditions of employment resulting from the resolution of the EEO complaint and an opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby. Accordingly, I find that Respondent violated §§ 16(a)(1) and (5) of the Statute by its failure to give the Union notice of the change in the conditions of employment on March 23, 1983, which resulted from its resolution of Ms. Curtis' EEO complaint, and

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[138] *Id.* at 46 (quoting General Counsel's Exhibit § 1(g) ¶¶ 6, 9, *Columbia Typographical Union*, 23 F.L.R.A. 35).

[139] *Id.* at 50.

[140] *Id.* at 47–48.

> affording the Union an opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby.[141]

The Authority never addressed the dicta in the ALJ's decision about an agency's freedom to meet with a bargaining unit employee without providing the bargaining unit an opportunity to have a representative attend the meeting. Rather, it found the ALJ erred by considering the General Counsel's original complaint, which read like a 5 U.S.C. § 7114(a)(2)(A) allegation sufficiently broad to encompass a 5 U.S.C. § 7116(a)(1) and a 5 U.S.C. § 7116(a)(5) allegation.[142]

Having declined to venture an opinion about how it would have ruled if the 5 U.S.C. § 7114(a)(2)(A) issue were properly before it, the Authority went on to discuss the "bypass" issue in the context of an employee's freedom to choose her representative under EEO regulations.[143] The Authority found no unlawful bypass occurred.[144] As support for its holding, the Authority made one of the best arguments in print why a union representative has no right to be present during EEO settlement conferences. First, the Authority pointed out that an individual complainant has a right to seek an *informal adjustment* of his complaint *at any point in the process*.[145] Second, the Authority noted:

> Nowhere in those regulations is there any provision for the exclusive representative's presence, unless the exclusive representative is the complainant's designated representative. The U.S. Court of Appeals for the District of Columbia Circuit recognized the rights of the employee

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[141] *Id.* at 51. Recall, the union was first notified, according to the date on the letter, five days later. *See id.* at 45.

[142] The Authority stated:

> [A]s the allegation that the Respondent failed to provide the Union with notice of the settlement and an opportunity to bargain was not encompassed by the complaint and thus was not before the Judge, the Authority concludes that the violation found by the Judge in this regard must be dismissed.

Id. at 39.

[143] *See id.*

[144] *See id.* at 38.

[145] *See id.* at 39. Compare the Ninth Circuit's analysis in *Fresno Service Center*, which found the wording of the EEOC regulations differentiating between precomplaint processing as "informal" discussions and postcomplaint filing processing as "formal" discussions to be controlling for the purposes of a 5 U.S.C. § 7114(a)(2)(A) analysis. *See* IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019, 1023-1024 (9th Cir. 1983).

victim of discrimination when it observed:

> . . . Congress has explicitly decided that a conflict between the identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. . . . Similarly, a direct conflict between the rights of an exclusive representative . . . and the rights of an employee victim of discrimination should also presumably be resolved in favor of the latter.[146]

Third, the Authority concludes its analysis with a discussion which, if applied after 1990, would set out the parameters by which the ADRA confidentiality provisions should be understood and applied to Air Force-conducted EEO mediations. The Authority agreed with the ALJ:

> [A]s a statement of general principle . . . while a union has no right to participate in the informal adjustment of an EEO complaint where a bargaining unit employee has elected to pursue the complaint of discrimination under the EEOC regulatory process . . . it may have a role if the settlement gives rise to an impact on the bargaining unit [spillover].[147]

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[146] *Columbia Typographical Union*, 23 F.L.R.A. at 39 (quoting National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181, 1189 n.12 (D.C. Cir. 1985)) (alterations in original). As further support for its opinion regarding the supremacy of the rights of individual EEO complainants, the Authority included the following:

> For examples of similar conflicts in the private sector resolved in favor of the victim of discrimination over the exclusive representative, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50-51 (1973), which held that the individual's right to equal employment opportunities may not be waived in a collective bargaining agreement; *International Union of Electrical, Radio and Machine Workers v. NLRB*, 648 F.2d 18, 26-27 (D.C. Cir. 1980), involving an individual EEO complainant's paramount right to the privacy and confidentiality of his or her EEO complaint over an exclusive representative's demand for a copy of the complaint and the employee's identity; *Airline Stewards and Stewardesses Ass'n, Local 550, TWU, et al. v. American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973), concerning the right of individual class members in an EEO case to exclude themselves from class actions brought by their exclusive representative.

Id. at 39 n.5.

[147] *Id.* at 40.

Although there may be more than one way to read the passage quoted above,[148] the most reasonable understanding of the quoted language is that while the union has no right to be present at EEO settlement discussions, the employer is still obligated to bargain with the union over any impact such an EEO settlement may have on other bargaining unit members.

D. Local 1857

In 1987, the Authority considered whether an agency attorney's interview of a bargaining unit employee in preparation for an arbitration hearing at which the employee was to appear as an adverse witness amounted to a 5 U.S.C. § 7114(a)(2)(A) "discussion" triggering the union's right to be present. *American Federation of Government Employees, Local 1857*[149] involved a case wherein the union had filed a grievance regarding which union steward should accompany the agency's safety personnel on safety inspections under the master labor agreement. Prior to the arbitration hearing, the union vice president, Solorio, notified the agency labor relations office that she would be representing the union and calling Timblin, a bargaining unit employee, as a witness at the

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[148] One way to read the quoted passage is as stated in the text above: no union right to be present at settlement discussions, but still a requirement for the employer to bargain over settlement impact on the bargaining unit. That interpretation is well supported by other language in the opinion, such as the reference to EEOC regulations that give the union no right to be present during attempts at informal adjustment of EEO complaints. *See NTEU v. FLRA*, 774 F.2d at 1189 n.12. Administrative Law Judge Naimark interpreted the passage in this fashion when applying the holding in *NTEU v. FLRA* to another EEO complaint case a year later in *National Treasury Employees Union*, 29 F.L.R.A. 660 (1987).

Another way to read the passage would be to understand the Authority to hold that if actions that would potentially impact the bargaining unit were to be discussed at the actual settlement discussion, the union's right to be present would arise. For example, if the passage were reworded slightly—"while a union has no right to participate in the informal adjustment of an EEO complaint where a bargaining unit employee has elected to pursue the complaint of discrimination under the EEOC regulatory process . . . it may have a role *in the informal adjustment* if the settlement gives rise to an impact on the bargaining unit"—a union would have a good argument that *Columbia Typographical Union* supports the assertion that a union should be represented at EEOC settlement discussions. However, given the context from which the passage is taken, the phraseology used by the Authority, and the reference to other judicial precedent establishing the supremacy of EEO complainant rights over union collective rights, such a reading would be strained at best.

[149] 29 F.L.R.A. 594 (1987).

arbitration. Solorio never notified Timblin that she would be calling him.[150] Thereafter, Schra, an agency labor relations specialist, called Timblin and asked him to meet with Wagonner (an agency attorney) the next Tuesday to discuss how he assigned safety inspection duties, among other things. Tuesday morning, while talking to the union's business agent about another matter, Wagonner said that he would have to cut his conversation short in order to interview Timblin for the upcoming arbitration.[151] The business agent asked Wagonner if he was aware that according to recent case law the union had a right to attend such discussions. Wagonner said that he did not think the case applied to the interview he intended to conduct and ended the conversation.[152] The meeting was held between Wagonner, Timblin, Schra, and Boffin (a labor relations officer) as previously scheduled by Schra.[153]

The agency argued, inter alia, that the meeting was not a discussion under 5 U.S.C. § 7114(a)(2)(A), and that even if it was a discussion it was not "formal."[154] The Authority ran through its "by the numbers" approach when analyzing the facts of the case to determine if a formal discussion was held.

> The Authority has consistently held that a formal discussion within the meaning of section 7114(a)(2)(A) exists only if all the elements of that section are present: there must be (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more employees in the unit or their representatives; (4) concerning any grievance or personnel policy or practices or other general condition of employment.[155]

Holding that the meeting was a discussion, the Authority first noted the broad meaning given to the word "discussion" for 5 U.S.C. § 7114(a)(2)(A) purposes under Authority precedent, reaffirming that "management [must] give the employees' exclusive representative adequate prior notice of, and an opportunity to be present at, [a] meeting even if the meeting was called for the purpose of making a statement or announcement rather than to engender dialogue."[156] Moreover, reasoned the Authority:

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[150] *See id.* at 595.

[151] *See id.*

[152] *See id.*

[153] *See id.*

[154] *See id.* at 596–597.

[155] *Id.* at 597–598.

[156] *Id.* at 598.

> "[W]hen an employer interviews an adverse witness rather than his own or even a neutral witness, common sense suggests that the situation carries a greater potential for *intimidation or coercion.*" When the May 20 meeting is considered in light of the overall purpose of section 7114(a)(2)(A) [safeguarding union interests], it is readily apparent that the Union had a representational interest to safeguard in any discussion occurring at this meeting—the assurance that its witness was not coerced or intimidated prior to his appearance at the scheduled arbitration hearing. A union, as a party to the bilateral process of arbitration, clearly has a stake in assuring that the process is carried out in a fair and impartial manner. Its presence at such meetings will assist in providing that assurance.[157]

Then, examining the totality of the facts surrounding the discussion, including that an agency lawyer conducted the interview with two other labor relations specialists present, that the agency counsel asked questions and took notes, that Timblin had been asked to attend in advance, that the subject matter of the meeting had been determined in advance, and that the meeting was held in the agency counsel's office, the Authority found the discussion was formal.[158]

Considering the facts in more general terms, *Local 1857* was about the union's right to be present during a step in a proceeding, the monitoring of which was part of the union's primary duties under the agreement it negotiated with the agency—the processing of grievances up through and including arbitration hearings. In sum, the union's role at witness interviews conducted in preparation for arbitration is based on its contracted, institutional role in the grievance process. On those facts, the agency was not in a position to borrow any of the favorable "no institutional union role" language or reasoning from *Fresno Service Center, NTEU v. FLRA*, or *Columbia Typographical Union* because *Local 1857* was about the union's role in ensuring fairness in the negotiated grievance process itself.[159]

On the same day the Authority issued its decision in *Local 1857*, it issued two decisions in other 5 U.S.C. § 7114(a)(2)(A) cases, each of which contained a slightly different spin on the definition of "grievance" under that section.

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[157] *Id.* at 598–599 (quoting National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181, 1192 (D.C. Cir. 1985)) (emphasis added).

[158] *See id.* at 603.

[159] The Authority also rejected an agency argument, not relevant here, that the discussion was an "examination" under 5 U.S.C. § 7114(a)(2)(B). *See id.* at 602.

E. National Treasury Employees Union

The first of the two decisions, *National Treasury Employees Union*,[160] involved an EEO complainant's right to exclude the union from settlement discussions and found the agency committed no ULP by allowing such an exclusion (but for reasons not based on the superior rights of EEO complainants as compared to the representational rights of the union).[161] On September 10, 1985, Lisa Anne Shea, an auditor with the agency and not a bargaining unit member, filed an EEO complaint "in which she alleged sexual harassment by two supervisors [that resulted] in her being denied a . . . promotion."[162] Some time later that month (the facts as recited in the ALJ's decision do not specify a date) Shea was transferred into a bargaining unit position as a License Fee Examiner.[163] On January 2, Shea and her attorney, Janet Aldrich, met with four management representatives (Alan Rosenthal, EEO review officer; Edward Tucker, manager of the agency's Civil Rights Program; John Cho, management representative; and Marvin Itzkowits, agency attorney) to discuss settlement terms. The union was not notified of the settlement meeting.[164]

When initially presented with the agency's settlement terms, Aldrich noted that it failed to address several items Shea desired, including the following: Shea wanted a performance appraisal changed from fully satisfactory to outstanding;[165] she wanted to be permanently transferred to a new job; and she wanted attorney's fees and other relief for "being held back for 18 months."[166] The parties were unable to define mutually acceptable terms, and the agreement was never signed.[167]

For reasons not specifically addressed in the ALJ's opinion, *both parties* agreed that none of the prior Authority or judicial precedent regarding the right of a union to be represented at settlement discussions

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[160] 29 F.L.R.A. 660 (1987).

[161] *See id.* at 665.

[162] *Id.* at 672.

[163] *See id.* at 673.

[164] *See id.* at 673–674.

[165] *See id.* at 674; *see also infra* note 188 describing how raising an employee's rating would directly impact her seniority calculation, which could have significant effects in a Reduction in Force.

[166] National Treasury Employees Union, 29 F.L.R.A. at 674.

[167] *See id.*

between complainants and their employers applied to the case at bar.[168] The ALJ analyzed the case as one of first impression, but drew heavily on the cases already discussed above.

Looking first to *Fresno Service Center*, the ALJ concluded that while an EEO complaint appears to meet the definition of grievance in the FSLMRS, the Ninth Circuit had held otherwise. "[Section] 7114(a)(2)(A) [of Title 5 of the United States Code] . . . does not govern the EEO procedures in the case since [EEO procedures] are separate and distinct from the grievance process to which Sections 7103 and 7114 of the Statute are directed."[169] Accordingly, based on the separate statutory process approach, the ALJ found Shea's EEO complaint not to be a grievance under 5 U.S.C. § 7114(a)(2)(A).[170]

Next, the ALJ drew on the language the Authority used in *Columbia Typographical Union*:

> As indicated by the Authority, nowhere in the EEO regulations is there any provision for the exclusive representative's presence, unless the latter is the complainant's designated representative. . . . Since no right attaches to the Union to be present during negotiations to adjust such grievances (unless the Union is chosen as the employee's representative), the role of the bargaining representative must necessarily be limited to situations where the adjustment or settlement impacts on the bargaining unit.[171]

The ALJ then referenced *Columbia Typographical Union* in support of the proposition that, notwithstanding the union's *nonrole* in EEO settlement discussions, the agency would have an obligation to bargain over the impact

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[168] *See id.* at 675. It is certainly understandable that the General Counsel would agree that prior law on that point was not applicable. After all, most of it would cut against expanding a union's role in the statutory EEO process. The General Counsel argued that *Columbia Typographical Union*, as a bypass case, and not a discussion case, was not applicable to the case at bar. *See id.* at 677–678. The agency apparently argued that because Shea was not a member of the bargaining unit when she actually filed her EEO complaint, her complaint was not a "grievance" within the meaning of 5 U.S.C. § 7114(a)(2)(A). *See id.* at 679 n.7. Although it is always easier to second guess a litigation strategy in any given case years after the fact, in retrospect, the agency counsel's argument may have been more persuasive had he not willingly surrendered the persuasive language from *Fresno Service Center* and *NTEU v. FLRA*.

[169] *Id.* at 676.

[170] *See id.* at 678.

[171] *Id.* at 677 (again, discussing spillover).

any agreed-upon settlements would have on the conditions of employment of other members of the bargaining unit, or spillover.[172]

On review, the Authority agreed with the ALJ, but for different reasons, that the agency committed no ULP by failing to notify the union of Shea's settlement discussions.[173]

The Authority began its analysis by reciting the elements of a 5 U.S.C. § 7114(a)(2)(A) analysis: "(1) formal discussion; (2) between one or more management representatives and one or more bargaining unit employees; [and] (3) concerning any grievance or any personnel policy or practices or other general condition of employment."[174] The Authority held Shea's settlement discussions clearly to be "formal discussions" under the FSLMRS, but found "the discussion did not concern a grievance or a personnel policy or practice or other general condition of employment within the meaning of the section 7114(a)(2)(A)."[175]

Shea's EEO complaint could not have been a grievance, reasoned the Authority, because she was not in the bargaining unit at the time she filed the EEO complaint or at the time of the events giving rise to the complaint.[176] As such, Shea's EEO complaint, while meeting the formal discussion elements, was held not to be a grievance. The Authority's read of grievance appeared clearly to diverge from the D.C. Circuit's "plain meaning of the statute" approach,[177] but there was at least a colorable

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[172] *See id.* at 679 n.6.

[173] *See id.* at 662.

[174] *Id.*

[175] *Id.*

[176] *See id.* at 662–663.

[177] In *NTEU v. FLRA*, the D.C. Circuit, when rejecting the FLRA's formulation of grievance to be only those employee complaints pursued through the negotiated grievance procedure, held that the plain meaning of the statute should govern. *See* National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181, 1185–1187 (D.C. Cir. 1985). The court found that an employee's MSPB appeal clearly fit the statutory definition. *See id.*; *see also* National Treasury Employees Union, 29 F.L.R.A. at 669 (Member Frazier, concurring in part and dissenting in part).

> I also do not see any reason to constrict the application of the term "grievance" in section 7114(a)(2)(A) merely because the events that gave rise to the employee's complaint occurred before the employee was in the unit. The literal language of section 7114(a)(2)(A) is not limited in this manner. Section 7114(a)(2)(A) states that an exclusive representative has a right to be represented at the discussion of "any grievance" . . . . The only limitation in section 7114(a)(2)(A) pertaining to unit status requires that the discussion at the meeting

justification for finding Shea's complaint not to be a grievance.[178] It is in the next part of the analysis where the Authority appeared to depart with its own prior reasoning.

Recall that in *NTEU v. FLRA* the D.C. Circuit described how the proper approach for analyzing whether the union has a 5 U.S.C. § 7114(a)(2)(A) institutional role in being represented at formal discussions turns on whether the proposed settlement to correct individually defined statutory wrongs committed by the employer will spill over into unit interests. Specifically, the court pointed out that "reinstatement or retroactive seniority . . . may affect other bargaining unit employees, since a benefit or opportunity granted to one employee can mean the loss of the same benefit or opportunity for another employee."[179] In short, the D.C. Circuit defined the union's institutional role[180] in terms of the nexus between the impact of a settlement agreement—the remedy—and the interests of the bargaining unit.

In *National Treasury Employees Union*, the majority endorses the spillover approach, observing "we also recognize that it is possible that a settlement of the EEO complaint in this case, for example, reassignment or promotion of the employee, might have affected employees in the bargaining unit."[181] But, curiously, the majority continues:

> In this case, we cannot conclude that the Union had any institutional right to be represented at the January 2 meeting in order to protect what the court identified in [*NTEU v. FLRA*] as a union's broader interests. Unlike the situation in [*NTEU v. FLRA*], where a meeting was held with a unit employee concerning a matter involving another unit employee, and the effects on the bargaining unit of actions taken with respect to the latter

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> involve "one or more employees in the unit" . . . . There is therefore no indication in the Statute that the "grievance" must have been filed while the employee was in the unit.

Id.

[178] *But see* American Fed'n of Gov't Employees, Local 648, 32 F.L.R.A. 465 (1988) (applying a broad statutory definition of "grievance" and rejecting the agency's argument that the subject of an MSPB appeal is not a grievance if the appeal has been dismissed with prejudice prior to the discussion).

[179] *NTEU v. FLRA*, 774 F.2d at 1188.

[180] The court defined the union's institutional role at least in so far as it should be thought of for purposes of the "personnel policies or general conditions of employment" part of the 5 U.S.C. § 7114(a)(2)(A) analysis. 5 U.S.C. § 7114(a)(2)(A) (1994).

[181] National Treasury Employees Union, 29 F.L.R.A. at 665.

> employee could be identified, the facts in this case differ. They demonstrate that the EEO complaint *was personal to the individual* who was not in the bargaining unit at the time of the events giving rise to the complaint. Since the January 2 meeting concerned solely the settlement of the EEO complaint where *circumstances surrounding the complaint* did not involve the bargaining unit, we fail to see a connection between a proceeding involving a non-bargaining unit concerns and the Union's right to represent the interests of bargaining unit employees.[182]

The majority's holding is curious because it mentions how the circumstances surrounding Shea's complaint were personal to the individual,[183] when the relief she wanted in her settlement agreement involved just the type of spillover impact on the bargaining unit the D.C. Circuit discussed in *NTEU v. FLRA*, the Authority discussed in *Columbia Typographical Union*, and the majority discussed earlier in this very opinion. Specifically, Shea sought, inter alia: (1) a permanent transfer to another position,[184] an opportunity which, if granted her, would "mean the loss of that same benefit or opportunity for another employee,"[185] to quote *NTEU v. FLRA*; and (2) a change in her performance appraisal from a fully successful rating to an outstanding rating,[186] which would have effectively given her "retroactive seniority,"[187] again quoting *NTEU v. FLRA*.[188]

As to the potential spillover impact of settlement terms on the bargaining unit, the majority offered:

> [W]e have previously stated that if the adjustment of an EEO complaint results in a change in unit employees' conditions of employment, an agency is obligated to give prompt notice of the change to the exclusive

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[182] *Id.* at 664–665 (emphasis added).

[183] *See id.*

[184] *See id.* at 674.

[185] National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181, 1188 (D.C. Cir. 1985).

[186] *See* National Treasury Employees Union, 29 F.L.R.A. at 674.

[187] *NTEU v. FLRA*, 774 F.2d at 1188.

[188] For example, in a Reduction in Force (RIF), employees are awarded points or years of credit according to their prior performance appraisals. Whereas an employee with an outstanding performance appraisal would be given credit for 20 years service (for purposes of calculating seniority during an RIF), an employee with a fully successful performance appraisal would be given credit for only 12 years of service. *See* 5 C.F.R. § 351.504 (1998).

> representative of the unit employees and to provide the union with an opportunity to bargain to the extent required by the Statute.[189]

What is also curious about the majority's opinion in *National Treasury Employees Union* is the total absence of any discussion regarding the superior rights of discriminatee complainants the Authority and the courts included as a common theme in *Fresno Service Center, NTEU v. FLRA* footnote 12, and *Columbia Typographical Union. National Treasury Employees Union* presented the Authority with an opportunity to rule clearly on an EEO complainant's right to exclude the union from settlement discussions without having such a choice constituting an agency ULP; precedent in two circuits would have squarely supported such a ruling. However, although the Authority walked around the edges of the issue, it did not directly address it.

To summarize the important points from *National Treasury Employees Union*: (1) if there is no nexus between the events giving rise to an employee complaint/grievance and the bargaining unit or its members, discussions regarding that complaint/grievance do not involve a 5 U.S.C. § 7114(a)(2)(A) grievance; and (2) similarly, if there is no nexus between the events giving rise to the complaint/grievance—as opposed to any proposed settlement terms—and the bargaining unit or its members, discussions regarding that complaint/grievance do not involve a 5 U.S.C. § 7114(a)(2)(A) "personnel policy or practice or other general condition of employment."[190]

F. Local 3882

It is likely the Authority steered clear of using any sweeping language regarding settlement discussions because, in the third opinion issued the same day as *National Treasury Employees Union* and *Local 1857*, the Authority used the fact that a meeting between the agency and an employee did not involve a "settlement" as a basis for determining that no 5 U.S.C. § 7114(a)(2)(A) discussion occurred. In *American Federation of Government Employees, Local 3882*[191] the Authority held the agency did

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[189] National Treasury Employees Union, 29 F.L.R.A. at 665.

[190] 5 U.S.C. § 7114(a)(2)(A) (1994).

[191] 29 F.L.R.A. 584 (1987).

not violate 5 U.S.C. § 7114(a)(2)(A) by excluding the union from an employee's oral reply to the agency's proposed thirty-day suspension.[192]

On December 9, 1985, Yvon Bien-Aime was given a notice of proposed removal by the agency. Prior to submitting his written response to the proposal, Bien-Aime and his attorney scheduled a meeting with prison warden John T. Hadden, a personnel officer, and a representative from UNICOR.[193] The meeting was held on January 10, 1986, as scheduled, in Hadden's office and lasted for about forty-five minutes, during which the personnel officer took notes. The meeting had an established formal agenda; Bien-Aime was to make his oral reply pursuant to 5 U.S.C. § 7513(b).[194] Hadden opened the meeting by restating the charges in the notice of proposed removal. Then Bien-Aime, assisted by counsel, made his presentation. Finally, Hadden closed the meeting by telling Bien-Aime that he understood his concerns and would decide the matter as soon as possible. Ultimately, Hadden issued Bien-Aime a letter of reprimand instead of suspending him, and Bien-Aime grieved the letter of reprimand.[195]

The agency argued that the meeting was not a discussion and, picking up on the Ninth Circuit's separate statutory process theme from *Fresno Service Center*, that it involved no grievance because Bien-Aime's suspension was merely proposed and was not a final agency action.[196] The Authority used the case as an "opportunity to discuss fully the intent and application of section 7114(a)(2)(A) of the Statute,"[197] particularly focusing on the "scope of the term 'grievance.'"[198] The Authority set out the "by the numbers" approach[199] from *NTEU v. FLRA* stating:

> [I]n examining each of these elements, we will be guided by that section's intent and purpose—to provide the union with an opportunity to

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[192] *See id.* at 584.

[193] *See id.* at 584–585. The record did not indicate the meaning of "UNICOR." *See id.* at 585 n.1.

[194] *See id.* at 585.

[195] *See id.* at 585–586.

[196] *See id.* at 587.

[197] *Id.* at 588.

[198] *Id.* at 589.

[199] The Authority noted:

> Thus, in order for the section 7114(a)(2)(A) right to exist, (1) there must be a discussion; (2) which is formal; (3) between one or more agency representatives and one or more unit employees or their representatives; (4) concerning any

> safeguard its interests and the interests of employees in the bargaining unit—viewed in the context of a union's full range of responsibilities under the Statute.[200]

Initially the Authority walked through *Fresno Service Center* and *NTEU v. FLRA* and adopted the position, consistent with *NTEU v. FLRA*, that "a 'grievance' within the meaning of § 7114(a)(2)(A) can encompass a statutory appeal," rejecting the separate statutory process approach.[201] The next three points the Authority made in its "scope of the term 'grievance' in section 7114(a)(2)(A)" discussion are particularly noteworthy.[202] First, the Authority endorsed the D.C. Circuit's recognition in *NTEU v. FLRA* that:

> [A] union's institutional role with respect to statutory appeal matters is more restricted than its role in the negotiated grievance procedure. Furthermore, as noted by the court in [*Fresno Service Center*,] there must be consideration given to any conflict between rights under section 7114(a)(2)(A) and those under *alternative statutory appeal procedures*.[203]

Next, the Authority described how it applied its conflict analysis in *Columbia Typographical Union* in the context of an alleged unlawful "bypass" saying:

> We concluded that the informal adjustment of an EEO complaint did not constitute a bypass of the union in that case because the direct dealings between the employee and the management representatives occurred pursuant to specific regulations of the EEOC [under the separate statutory process approach]. Similarly, if there is a conflict between rights under section 7114(a)(2)(A) and *those under other statutes*, we will consider that conflict in determining whether section 7114(a)(2)(A) has been violated.[204]

> grievance or personnel policy or practices or other general condition of employment.

Id. at 588–589.

[200] *Id.* at 589.

[201] *Id.* at 590.

[202] *Id.* at 589.

[203] *Id.* at 590 (emphasis added).

[204] *Id.* (emphasis added).

To paraphrase, the Authority conceded that union rights are restricted under statutory appeal procedures, and that such rights may properly be subordinated to other interests when their exercise would conflict with "other statutes."[205] The footnote following the quote above cites *NTEU v. FLRA*, "where the court discussed the need for resolution of such conflicts when they arise,"[206] presumably referencing the D.C. Circuit's description of how statutory conflicts implicating Title VII disputes should be resolved in favor of the EEO complainant and against the union. But the language in the body of the Authority's opinion is not so limited. The Authority simply says that when employees and management hold discussions pursuant to other statutes the Authority should consider the conflict between 5 U.S.C. § 7114(a)(2)(A) and those statutes when determining if the former has been violated.[207] The Authority, in its discussion about other statutes partially resurrected the separate statutory process approach that had been rejected by the D.C. Circuit. Following this case, the fact that a discussion was held pursuant to some other statute does not end the analysis, as it did in *Fresno Service Center*, but it is a factor the Authority must consider.

According to the Authority, an employee who transmits a dispute resolution communication to his employer pursuant to the confidentiality protections established in the ADRA,[208] which is to say during a private caucus with a mediator, will clearly have been engaged in a discussion with a representative of the agency.[209] According to *Local 3882*, the Authority will be bound to consider the ADRA (as an "other statute") when scrutinizing allegations regarding agency violations of 5 U.S.C. § 7114(a)(2)(A).[210] Whether the Authority will consider the union's rights under the Federal Service Labor-Management Relations Statute superior to the interests Congress intended to further under the ADRA remains an open question because of the significance the Authority attached to "settlement discussions" in *Local 3882*.

The Authority ultimately held Bien-Aime's meeting with Hadden and the other management representatives did not involve a grievance because

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[205] *See id.*

[206] *Id.* at 590 n.2.

[207] *See id.* at 590.

[208] *See supra* notes 60-66 and accompanying text discussing the confidentiality provisions of the ADRA.

[209] According to currently applicable FLRA precedent, even an independent contractor conducting "agency" business is a representative of the agency. *See* Laborers' Int'l Union, Local 1276, 39 F.L.R.A. 999, 1013 (1991).

[210] *See Local 3882*, 29 F.L.R.A. at 590.

the proposed thirty-day suspension was, at the time of that meeting, "merely a possibility. . . . In these circumstances, there was no 'complaint' by Bien-Aime and thus no 'grievance' under section 7103(a)(9)."[211] The Authority interpreted the D.C. Circuit's construction of 5 U.S.C. § 7114(a)(2)(A)'s intent as support for its conclusion. According to the Authority, this intent turns on one of three union interests. First, the union has an interest in knowing what management considers to be acceptable versus unacceptable behavior.[212] Second, the union has a role if a remedy for improper managerial conduct spills over into bargaining unit interests.[213] And third, the union has an interest in guarding against coercion or intimidation of bargaining unit members.[214] Having defined the union's interest according to those factors, the Authority found Bien-Aime's oral reply not to concern a grievance, because (1) the agency's role was—and was anticipated prior to the meeting to be—purely passive (Hadden read the charge, listened, and said he would decide as soon as he could), so presumably it would not be saying anything relevant to the first factor; (2) there was no indication of coercion or intimidation (the third factor); and (3) settlement discussions were not anticipated (the second factor—spillover).[215]

Because mediations conducted pursuant to the ADRA will be entered into specifically for the purpose of attempting to settle cases, *Local 3882* can be read to establish a potentially sweeping precedent that all Air Force mediations will implicate union interests based on the possible spillover of remedies into bargaining unit interests.

G. Department of Veterans Affairs

In 1994, the Ninth Circuit introduced the predecision/postdecision element to distinguish *Fresno Service Center* from a case involving an agency's interviews of witnesses for an upcoming Merit Systems Protection Board hearing in *Department of Veterans Affairs v. Federal Labor Relations Authority*.[216] In *Department of Veterans Affairs* the Ninth Circuit upheld the Authority's determination that agency interviews of witnesses, without a

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[211] *Id.* at 591.

[212] *See id.*

[213] *See id.*

[214] *See id.*

[215] *See id.* at 592.

[216] 16 F.3d 1526 (9th Cir. 1994).

union representative present, in preparation for an MSPB hearing, but *after* the agency had completed its investigation regarding the subject matter of the hearing, was a violation of 5 U.S.C. § 7114(a)(2)(A).[217]

In January 1988, the agency fired Gary Dekoekkoek, a bargaining unit member, for substandard performance and for tardiness. He appealed his discharge to the MSPB and designated the union as his representative.[218] Agency counsel, Patricia Geffner, conducted telephone interviews with several union employees when preparing for the hearing. Prior to the hearing, Geffner called Dekoekkoek's union representative and notified him that she had interviewed the witnesses.[219] The union filed ULP charges alleging, inter alia, that Geffner's interview of the witnesses without affording the union an opportunity to have a representative present violated 5 U.S.C. § 7114(a)(2)(A). The ALJ and the Authority found in favor of the union.[220]

The Ninth Circuit first drew a distinction between interviews conducted during agency investigations of alleged misconduct of bargaining unit employees, and postinvestigation interviews of such employees that take place at a point after which management has already decided to discipline the union member.[221] The court held that, during an investigation, when striking a balance between the agency's legitimate need to be able to require employees to account for their time during an investigation and safeguarding union interests, the balance tips in favor of the agency.[222] However, after the agency decides to take action against a union member, "[s]ound policies support shifting the balance at that point" by guaranteeing the union a right to be present at all formal discussions concerning that action.[223] As applied to the facts of the case, the court held that because the agency had already determined to fire Dekoekkoek, the union should have been afforded an opportunity to be present at all formal discussions regarding that agency action.[224]

The court then retraced the Authority's "by the numbers" 5 U.S.C. § 7114(a)(2)(A) analysis, first considering whether Geffner's interviews of

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[217] *See id.* at 1532–1533.

[218] *See id.* at 1529.

[219] *See id.* at 1527.

[220] *See id.* at 1529.

[221] *See id.* at 1530.

[222] *See id.*

[223] *Id.*

[224] *See id.*

the bargaining unit members were "formal discussions,"[225] and then considering whether the substance of those interviews concerned a "grievance."[226] The court cited the following indicia of formality when concluding the interviews were formal discussions:

> The interviews were conducted in a supervisor's or second-level supervisor's office [where employees were called to participate in telephone interviews], an area removed from the employee's normal work environment. The staff attorney represented a high level of management. The interviews lasted between five minutes and more than an hour. They were planned in advance and concerned only one topic, Dekoekkoek's upcoming Board hearing.[227]

The court declined the agency's invitation to consider the informal purpose of the interviews, rather than the Authority-defined "indicia of

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[225] *See id.* at 1531–1532.

[226] *See id.* at 1533–1534.

[227] *Id.* at 1531–1532. The court listed as indicia of formality:

> Generally speaking, the scope of formality within the meaning of the Statute is extremely broad. A meeting is formal unless it is a "casual conversation or a conversation that followed from an impromptu meeting." [*American Fed'n of Gov't Employees, Local 1857*, 35 F.L.R.A. 594, 604 (1990).] *See also Local 2241*, 3 F.3d at 1389 (a meeting is formal unless it is a "spontaneous or chance meeting[] in the workplace"); *NTEU* [*v. FLRA*], 774 F.2d at 1190 (to escape formality, a meeting must be an "impromptu gathering"). Within that broad compass, whether a discussion is "formal" depends on the totality of the circumstances. The FLRA has commonly looked to a number of specific factors to determine formality, such as the level in the management hierarchy of the person who called the discussion; whether other management representatives attended the discussion; where the discussion took place; how long it lasted; how the employee was summoned to it; whether there was a formal agenda; whether the employee was required to attend; and whether the employee's name and comments were transcribed. *United States Dep't of Labor, Chicago, Ill. v. Am. Federation of Gov't Employees, Local 648*, 32 F.L.R.A. 69, 1988 WL 212939 (FLRA) at *4-5 (1988) ("Chicago").

Id.; *accord* American Fed'n of Gov't Employees, Local 1482, 45 F.L.R.A. 1332, 1335 (1992) (finding a meeting not to be a formal discussion because the disputed meeting was held on the shop floor and lasted only ten minutes.)

> Thus, neither the length nor the location of the meeting suggest that it was a formal discussion of working conditions. In addition, it is undisputed that: (1) only one management official, a first-level supervisor, attended the meeting; (2) no agenda was prepared for the meeting; and (3) no notes of the meeting were taken.

Id.

formality" to be controlling, holding that even if it were to abandon the Authority's already well-accepted method of determining formality, the purpose of the meeting was plainly not informal.[228] "Preparation for a Board hearing is not an informal goal, and assessing the testimony of potentially adverse witnesses is not an informal undertaking."[229]

Interestingly, when distinguishing *Fresno Service Center* the court (as did the Authority in *National Treasury Employees Union*) said nothing about *Fresno Service Center* being different based on the supremacy of an individual's rights in a discrimination case as compared to an individual's rights in a case not implicating Title VII. Rather, the court reiterated that it characterized the discussion in *Fresno Service Center* as informal, only because the EEOC regulations covering precomplaint conciliation conferences characterized them that way.[230] The court went on:

> Under that framework, the employee was required to try to resolve a complaint on an informal basis . . . . Here, however, no comparable regulatory scheme exists. The *record reflects no statutory or regulatory framework that either encourages or requires an employee to attempt to resolve complaints informally*. Certainly, here, no Board regulation explicitly or implicitly defines the interviews as informal rather than as formal discussions. To the contrary, the interviews were part of the formal grievance procedure. They were not an *effort to preempt the formal process*, but a step towards, and a part of, the culmination of that process. For these reasons, we find that the FLRA acted within its authority in ruling that the interviews were formal within the meaning of the Statute.[231]

Although the record may have contained no statutory or regulatory framework encouraging informal resolution of complaints, the ADRA of 1990 certainly did. Section 3 spoke strongly regarding, although did not specifically direct, federal agencies' obligation to begin using ADR methods, including mediation and conciliation, to resolve disputes in connection with litigation brought by or against the agency, such as personnel actions.[232] In 1996, the law was reworded to more pointedly direct agency action: "[Agencies must] consult with the agency designated

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[228] *Department of Veterans Affairs*, 16 F.3d at 1532.

[229] *Id.*

[230] *See id.*

[231] *Id.* (emphasis added).

[232] *See* Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 3, 104 Stat. 2736, 2736-2737 (1990).

by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, to *facilitate and encourage agency use of alternative dispute resolution* under subchapter IV of chapter 5 of such title"[233] and "examine *alternative means of resolving disputes.*"[234]

The ADR methods encouraged by the 1996 Act, including the Air Force mediation model, are precisely the type of "*effort to preempt the formal process*," the court strongly implied it would have characterized as informal in *Department of Veterans Affairs*.[235] Although consideration of the strong ADRA preference for informal settlement of all sorts of grievances may not have—and rightly probably should not have—changed the outcome of the formality analysis in a witness interview case like *Department of Veterans Affairs*, the court's formality preempting factor squarely mitigates against finding Air Force-conducted mediations of employee complaints (EEO and MSPB) to be formal discussions for purposes of 5 U.S.C. § 7114(a)(2)(A).

When analyzing the grievance prong, the court referred to the broad definition of the term in 5 U.S.C. § 7103(a)(9).[236] The court rejected the agency's argument that the case did not concern a grievance because Dekoekkoek was pursuing his claim via a statutory right of action rather than through the negotiated grievance process—a separate statutory process argument—and specifically adopted the D.C. Circuit's broad, statutory-based definition of grievance in *NTEU v. FLRA*.[237] In doing so, the court contrasted *Fresno Service Center*, a case involving "a charge filed under Title VII, a Congressional enactment unconnected to the Statute" with the case at bar in which an employee charge was filed under "a statute that Congress enacted to implement its finding that 'labor organizations and collective bargaining in the civil service are in the public interest.'"[238]

In the wake of *Department of Veterans Affairs*, the following two important indicia of formality have been added to the formal discussion part of a 5 U.S.C. § 7114(a)(2)(A) analysis: (1) whether the discussion is

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[233] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 4(a), 110 Stat. 3870, 3871 (1996) (emphasis added).

[234] 5 U.S.C. § 571(2) (1994 & Supp. II 1996) (emphasis added).

[235] *Department of Veterans Affairs*, 16 F.3d at 1532 (emphasis added).

[236] *See id.* at 1533.

[237] *See id.* at 1533–1534 & n.4.

[238] *Id.* at 1533 (quoting 5 U.S.C. § 7101(a) (1994)); *cf.* American Fed'n of Gov't Employees, Local 1857, 29 F.L.R.A. 594 (1987) (dealing with union's role in the very process in which it was contractually obliged to be involved).

conducted in an "effort to preempt the formal process";[239] and (2) whether, in light of the ADRA, there is now an unmistakable statutory and regulatory framework encouraging agencies and employees to attempt to resolve complaints *informally*.[240] Both factors appear to provide agency counsel with arguments that Air Force mediations of employee disputes are not formal discussions.

Two 1995 cases decided by the Authority establish the superiority of an EEO complainant's rights over a union's rights in the area of government information practices. In *National Air Traffic Controllers Association*[241] and *American Federation of Government Employees, Local 1594*,[242] the Authority balances the government's obligation to make certain records available under the Freedom of Information Act (FOIA)[243] against an individual's interests under the Privacy Act.[244]

H. National Air Traffic Controllers

In *National Air Traffic Controllers*, the union alleged the agency committed a ULP by refusing to provide the union with a copy of a settlement agreement resolving a bargaining unit employee's formal EEO complaint.[245] A union representative attended the first meeting held between the agency and the employee following the employee's filing of the formal complaint, but the union was not permitted to attend subsequent meetings between the parties. Ultimately, the agency and the employee agreed on mutually acceptable terms, which called for the employee to be transferred to a nonbargaining unit position, and reduced the settlement to writing.[246] The agency then notified the union of the terms of the settlement and offered to bargain over the impact of the reassignment. The agency refused the union's request that it provide the union with a copy of the

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[239] *Department of Veterans Affairs*, 16 F.3d at 1532.

[240] The term "informally" as used here is intended to indicate resolution of employees' appeals and complaints through the use of ADR, and not as the term "informal" was confined to a single, narrow meaning in an administrative regulation, as the Ninth Circuit held in *Fresno Service Center*. *See* IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019, 1023–1024 (9th Cir. 1983).

[241] 51 F.L.R.A. 115 (1995).

[242] 51 F.L.R.A. 530 (1995).

[243] 5 U.S.C. § 552(b)(6) (1994).

[244] 5 U.S.C. § 552a(b)(2)–(3) (1994).

[245] *See National Air Traffic Controllers*, 51 F.L.R.A. at 116.

[246] *See id.* at 117.

actual agreement because the employee refused to authorize the agency to release a copy of it to the union.[247]

The General Counsel argued, inter alia, that "[t]he only . . . privacy interest the employee might have in nondisclosure of the . . . settlement agreement would be to avoid revealing [the employee's] identity or the [agreement's] specific [terms]" and that because the employee's identity was already known, no further invasion into his privacy would occur.[248] Additionally, the General Counsel argued "that the terms of a settlement agreement 'are not [purely personal,]' but reflect the action an agency agrees to take in furtherance of its responsibilities under antidiscrimination laws."[249]

The agency rebutted both assertions. First, it argued "it is difficult to imagine a greater privacy interest in government records than an employee's interest in protecting the personal elements of a negotiated settlement."[250] Second, it argued that the information requested involved no public information, because disclosure of the settlement terms "would not contribute to the public's understanding of how the Respondent performs its statutory duties, which promote civil aviation and establish aviation [safety] standards."[251] Therefore, maintained the agency, the employee's privacy interests outweighed the insufficient public interest articulated by the General Counsel.[252]

The Authority sided with the agency, finding "disclosure . . . [of the requested record] would constitute a clearly unwarranted invasion of personal privacy and, therefore, is prohibited by the Privacy Act."[253] The Authority explained that when an agency refuses to disclose information requested pursuant to 5 U.S.C. § 7114(b)(4), alleging such release would constitute a clearly unwarranted invasion of personal privacy under FOIA exemption 6[254] and, therefore a violation of the Privacy Act, the following analysis is appropriate:

> [A]n agency asserting that the Privacy Act bars disclosure is required to demonstrate: (1) that the requested information is contained in a "system

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[247] *See id.*

[248] *Id.* at 117 (alterations in original).

[249] *Id.* at 118.

[250] *Id.*

[251] *Id.*

[252] *See id.*

[253] *Id.*

[254] *See* 5 U.S.C. § 552(b)(6) (1994).

> of records" under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the agency makes the requisite showings, the burden shifts to the General Counsel to: (1) identify a public interest that is cognizable under the FOIA; and (2) demonstrate how such disclosure will serve that public interest. Although the parties bear these burdens, we will, where appropriate, consider matters that are otherwise apparent.[255]

First, with regard to public interest in the information requested, the Authority adopted the agency's position that "the only relevant public interest to be considered in this context is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens as to the activities of the Government."[256] The Authority then specifically rejected the General Counsel's assertion that the public interest in collective bargaining, or the union's role in fulfilling its obligations under the system governing collective bargaining was a sufficiently public purpose to be considered in a FOIA exemption 6 analysis.[257]

Nonetheless, the Authority found the record requested by the union to involve both public and private interests. Citing *Fresno Service Center* and other authorities, some from the private sector, the Authority found the employee had a privacy right in the record requested, reasoning "Congress and the courts have recognized the privacy interests of employees who file discrimination complaints."[258] The Authority rejected the General Counsel's argument that the employee had already lost the only privacy interest she had in the record (i.e., her identity was already known) based solely on the fact that the employee wished the document to remain private.[259]

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[255] *National Air Traffic Controllers*, 51 F.L.R.A. at 119.

[256] *Id.*

[257] *See id.* at 119.

[258] *Id.* at 121.

[259] *See id.* at 122. The Authority noted that the record almost completely lacked evidence regarding the actual content of the settlement agreement.

> The stipulated record does little to elucidate this matter, since the parties provided neither a copy of the Settlement Agreement for our *in camera* review, nor an agreed-upon description of its contents. However, the employee's refusal to approve release of the agreement to the Union, Stip. at 2, para. 11, does not support the General Counsel's cramped description of its content. Rather, it suggests that the employee views the document as revealing information she

The Authority also found the record requested to implicate a public interest in that it "would shed light on agency actions taken to remedy unlawful discrimination."[260] However, the Authority continued, "we are not persuaded that this public interest is served by disclosing such information in a form that identifies employees who have filed EEO complaints and/or connects them with personal information revealed in the agreements."[261] The Authority concluded, based on precedent from several jurisdictions, that in cases like the one before it, wherein it would have been impossible to sanitize the record of any information relating to a specific individual, "the public interest that would be served by disclosing the terms of the settlement agreement is outweighed by the invasion of privacy that would result."[262]

I. Local 1594

American Federation of Government Employees, Local 1594,[263] decided two months after *National Air Traffic Controllers*, again considered a case involving the FOIA balancing test, this time in the context of a union's request for a copy of the "last chance" agreement between an agency and an unsatisfactorily performing employee. In *Local 1594*, a bargaining unit employee, after being notified of the agency's intent to remove her for poor performance, "met with management and orally replied to the proposed removal."[264] The employee declined union representation both at the initial meeting, as well as in relation to all "other matters connected to her proposed removal."[265] After the meeting, the agency provided the employee with its decision, which was accompanied by a last chance agreement that the employee signed.[266]

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wishes to remain private. In short, the record before us does not provide a basis for finding that the privacy interests implicated by disclosure are minimal or nonexistent.

Id. at 122.

260 *Id.*

261 *Id.*

262 *Id.* at 123.

263 51 F.L.R.A. 530 (1995).

264 *Id.* at 532.

265 *Id.*

266 *See id.*

At that point, the union had two concerns. First, it argued in a letter to the agency that the agency committed a ULP by failing to give the union an opportunity to be represented at the oral reply meeting, which the union viewed as a formal discussion according to 5 U.S.C. § 7114(a)(2)(A).[267] Second, the union wanted copies of all documents signed by the employee concerning the agreement.[268] The agency denied the union's request for documents based on the same reasoning asserted by the agency in *National Air Traffic Controllers*; it viewed the Privacy Act as prohibiting disclosure, noting that the employee had not requested union representation in the matter.[269]

In finding the information requested by the union to be protected by the Privacy Act, the Authority retraced the analytical steps it followed in *National Air Traffic Controllers*, first laying out the respective burdens and then restating that a union's general institutional role in the collective bargaining process is insufficient to qualify for consideration in a FOIA exemption 6 analysis.[270] The Authority also found that, like unsanitized settlement agreements in EEO cases, "unsanitized information about disciplinary and adverse actions implicates significant privacy interests. . . . This finding is consistent with the conclusions reached by courts reviewing claims under Exemption 6 of the FOIA."[271] Also, and in similar fashion to its reasoning in *National Air Traffic Controllers*, the Authority placed significant emphasis on the fact that the employee "refused to approve release of the last chance agreement to the Union and chose not to have the Union act as her representative. These facts indicate that the employee's privacy interests are implicated and that the employee wishes not to disclose such embarrassing and stigmatizing information to the Union."[272] Lastly, and again following *National Air Traffic Controllers*, the Authority held "because the last chance agreement was requested for only one name-identified employee, it is not possible to protect the identity of the individual whose privacy is at stake."[273]

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[267] The Authority never actually considered the 5 U.S.C. § 7114(a)(2)(A) claim. "The record does not disclose whether the Union pursued its claim that the oral reply meeting constituted a formal discussion. That claim is not before us in this case." *Id.* at 532 n.4.

[268] *See id.* at 532.

[269] *See id.* at 533.

[270] *See id.* at 534–535.

[271] *Id.* at 536 (citations omitted).

[272] *Id.*

[273] *Id.* at 537.

In *Local 1594*, the General Counsel made an additional argument, regarding the release of the last chance agreement, not seen in *National Air Traffic Controllers*. Specifically, the General Counsel argued that the agency was obligated to release the last chance agreement under the Routine Use Exception to the Privacy Act.[274] The Authority held the agreement was not releasable under the Routine Use Exception according to the test set out in the September 1992 Federal Personnel Manual (FPM) Letter 711-164.[275] That letter spelled out that a union must show the following in order to establish a routine use exception:

> (1) the information is "relevant" to the express purpose for which it is sought, meaning that the nature of the information must bear a traceable, logical, and significant connection to the purpose to be served; and (2) the information is "necessary," meaning that there are no adequate alternative means or sources for satisfying the union's informational needs. In clarifying this second requirement, the FPM Letter explains that it is to be determined on a case-by-case basis; the union "must show that it has a particularized need for the information in a form that identifies specific individuals, and that its information needs cannot be satisfied through less intrusive means, such as by releasing records with personally-identifying information deleted."[276]

The Authority compared the formality factors it considers when scrutinizing 5 U.S.C. § 7114(a)(2)(A) allegations[277] to the last chance

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[274] *See id.* at 533.

[275] *See id.* at 538-539.

[276] *Id.* at 538 (quoting OFFICE OF PERSONNEL MANAGEMENT, U.S. CIVIL SERV. COMM'N, LETTER NO. 711-164, FEDERAL PERSONNEL MANUAL (1992)).

[277] The Authority stated that:

> [I]n determining whether a discussion is "formal," within the meaning of section 7114(a)(2)(A), the Authority considers a number of relevant factors: (1) the position in the management hierarchy occupied by the individual who held the meeting; (2) whether any other management representatives attended; (3) where the discussion took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the discussion lasted; (5) how the meeting was called (i.e., with formal advance written notice or more spontaneously and informally); (6) whether a formal agenda was established; (7) whether employee attendance was mandatory; and (8) the manner in which the meeting was conducted (i.e., whether the employee's identity and comments were noted or transcribed).

Id. at 538 (citing Laborers' Int'l Union, Local 1276, 14 F.L.R.A. 475, 477 (1984)).

agreement[278] and found nothing in the last chance agreement relevant to any of those factors.[279] Therefore, the Authority found the General Counsel failed to show the agreement bore "a traceable, logical, and significant connection to the . . . purpose" for which it was requested—to determine if the employee's oral reply to the notice of proposed removal was a "formal discussion."[280]

The noteworthy points from *National Air Traffic Controllers* and *Local 1594* are the following: (1) releasing unsanitized information regarding specifically identifiable EEO complainants would constitute an unwarranted invasion of personal privacy under FOIA exemption 6 and would therefore violate the Privacy Act; (2) releasing unsanitized information regarding disciplinary and adverse actions as they relate to a specifically identifiable employee would constitute an unwarranted invasion of personal privacy under FOIA exemption 6 and would therefore violate the Privacy Act; and (3) in cases where such information is sought in relation to any specifically identifiable individual's work-related dispute, it is impossible to sanitize the information requested to be released.

V. ANALYSIS

A number of recurrent themes emerge from the leading cases addressing the union's right to be present during settlement discussions between the employer and statutory grievant employees. They range from the very general to the very detail-specific. For example, in general terms, a person who had only an hour or so to form an opinion from the leading cases might conclude, correctly, that 5 U.S.C. § 7114(a)(2)(A) does not give unions a right to be present at settlement discussions between EEO complainants and the agency unless the complainant has requested union representation.[281] Additionally, that pressed-for-time reader might also

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[278] The agreement is not found in or attached to the opinion, but the Authority had performed an in camera review. *See id.* at 539.

[279] *See id.*

[280] *Id.* at 540. Note also that the ADRA exempts from FOIA disclosure requirements all covered dispute resolution communications under 5 U.S.C. § 552(b)(3). *See* 5 U.S.C. § 574(j) (Supp. II 1996).

[281] *See* IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019, 1023 (9th Cir. 1983); *Local 1594*, 51 F.L.R.A. at 538-539; National Air Traffic Controllers Ass'n, 51 F.L.R.A. 115, 120 (1995); National Treasury Employees Union, 29 F.L.R.A. 660, 664-665 (1987); Columbia Typographical Union No. 101, 23 F.L.R.A. 35, 41 (1986).

conclude that 5 U.S.C. § 7114(a)(2)(A) does give unions a right to be present during postinvestigation agency interviews of witnesses in preparation for hearings before third party neutrals.[282] The middle ground between those two positions, and there is a good deal of it, is not quite so easily distilled down into a set of clear rules.

A. *Legal Conflicts*

1. *EEO Settlement Discussions*

At least two circuit courts and the Authority have stated in dicta that in the event of a conflict between an EEO complainant's right to exclude the union from settlement discussions and a union's right to be present (and in the Authority's view to be provided copies of documents related to the settlement) have unambiguously declared the EEO complainant's privacy rights trump the union's representational rights.[283] It is troubling that despite the sweeping nature of the language used in those cases neither the courts nor the Authority have been willing to declare the rights of an EEO complainant superior to the union's in a case actually involving an EEO complainant.[284] Although the precedent seems pretty clear, the reluctance

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[282] *See* Department of Veterans Affairs v. Federal Labor Relations Authority, 16 F.3d 1526, 1530 (9th Cir. 1994). *See generally*, National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181, 1188–1189 (D.C. Cir. 1985). For a thorough discussion of a union's 5 U.S.C. § 7114(a)(2)(A) rights during witness interviews, and the impact of 5 U.S.C. § 7114(a)(2)(A) on the attorney work product privilege, see generally Drenan, *supra* note 71. Drenan argued that the D.C. Circuit's decision in *NTEU v. FLRA* should not be followed because, as Drenan accurately observes, the decision "puts management in the unenviable position of having to allow the other side access to its interviews of all bargaining unit members for hearings before nearly any forum the agency and an employee find themselves." *Id.* at 194. Despite Drenan's well founded argument that agency counsel should resist following the potentially damaging language in the D.C. Circuit's decision, the Ninth Circuit unfortunately has endorsed the D.C. Circuit's broad application of 5 U.S.C. § 7114(a)(2)(A) to such interviews. *See Department of Veterans Affairs*, 16 F.3d at 1530.

[283] *See NTEU v. FLRA*, 774 F.2d at 1188–1189, 1189 n.12; *Fresno Service Center*, 706 F.2d at 1023; *Columbia Typographical Union*, 23 F.L.R.A. at 39–41, 39 n.5.

[284] *See National Air Traffic Controllers*, 51 F.L.R.A. at 123; National Treasury Employees Union, 29 F.L.R.A. at 664–665. Both cases involve EEO complainants but were resolved on grounds other than the supremacy of an EEO complainant's rights over the union's. *Compare NTEU v. FLRA*, 774 F.2d at 1188–1189, 1189 n.12

by those bodies authoritatively to rule on this issue leaves the door open, even if only a little, for the General Counsel to attempt to insert the union's nose where Congress (as found by the courts and the Authority) has decided it does not belong.

Even prior to the passage of the ADRA, which now clearly provides a "statutory or regulatory framework that . . . encourages . . . employee[s] to attempt to resolve complaints informally,"[285] the courts and the Authority had cited several reasons supporting an EEO complainant's right to exclude a union from settlement discussions including the following: (1) the Authority exceeds its charter when it attempts to interpret rules and statutes regarding "discrimination in federal employment, a field Congress explicitly has delegated to the EEOC";[286] (2) protecting the privacy of EEO complainants serves an important public interest;[287] and (3) the union has no institutional role in EEO settlement discussions other than its right to bargain with management over the spillover impact a settlement may have on the bargaining unit.[288] These arguments apply, under the language of these cases, during any settlement discussions an EEO complainant has with his employer, whether those discussions are covered "dispute resolution communication[s]"[289] under the ADRA or not.

Since passage of the ADRA, the agency has additional arguments, under *NTEU v. FLRA* and *Department of Veterans Affairs*, that its decision to abide by an EEO complainant's wishes to exclude the union from settlement discussions does not constitute a violation of 5 U.S.C. § 7114(a)(2)(A), so long as the settlement discussions from which the union is excluded take place according to the requirements of the ADRA's confidentiality provisions. Recall under *NTEU v. FLRA*, the D.C. Circuit conceded that the union's representational role relating to statutory

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(involving an MSPB appellant, but the court spoke in sweeping terms about the rights of Title VII complainants in footnote 12), *with Columbia Typographical Union*, 23 F.L.R.A. at 41 (involving an EEO complainant where the ALJ apparently followed sweeping language from *NTEU v. FLRA* and offered dicta on the right of the agency to discuss an EEO settlement with a complainant without notifying the union, but the Authority ruled on other grounds, avoiding the "supremacy" issue entirely).

[285] *Department of Veterans Affairs*, 16 F.3d at 1532.

[286] *Fresno Service Center*, 706 F.2d at 1023.

[287] *See id.*; *see also National Air Traffic Controllers*, 51 F.L.R.A. at 120–121 (recognizing significant privacy interest of EEO complainants).

[288] *See NTEU v. FLRA*, 774 F.2d at 1188; *National Treasury Employees Union*, 29 F.L.R.A. at 660; *Columbia Typographical Union*, 23 F.L.R.A. at 40.

[289] 5 U.S.C. § 574(a) (1994 & Supp. II 1996).

complainants is "obviously more restricted" than its role under 5 U.S.C. § 7114(a)(2)(A) and that the union's role may therefore be subordinated to other interests based on a finding that such subordination is what Congress intended.[290] Additionally, recall that in *Department of Veterans Affairs* the Ninth Circuit distinguished a case involving an MSPB witness interview from the EEO settlement discussion in *Fresno Service Center* on the ground that whereas the EEOC regulations covering complaint processing reflect a framework encouraging employees to attempt informal resolution of their complaints, no similar framework (presented in the record to the court) applied to MSPB appeals.[291]

The intent of Congress in passing the ADRA is clear: (1) federal agencies and their employees shall implement procedures to resolve disputes without going through formal litigation,[292] and (2) protecting the confidentiality of communications between parties to the procedure and the neutral is paramount.[293] Moreover, resolution of employee complaints according to mediation is exactly the type of formality preempting statutory framework encouraged under the ADRA that the Ninth Circuit indicated would be significant in *Department of Veterans Affairs*.[294] Therefore, according to the Ninth Circuit and the D.C. Circuit, a statutory complainant (such as an EEO complainant, or an MSPB complainant for that matter) pursuing resolution of his complaint through a system Congress intended to be confidential (under the ADRA) may exclude the union from private caucuses between himself and the mediator without having the agency's acquiescence in that request constitute a violation of 5 U.S.C. § 7114(a)(2)(A).

In sum, the agency should defend its decisions to exclude the union from EEO settlement discussions altogether, arguing that judicial and Authority precedent independent of any consideration of the ADRA established the sanctity of the EEO complainant's right to keep settlement discussions confidential. The agency should also argue that above the precedentially created floor favoring the rights of EEO complainants, the

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[290] *NTEU v. FLRA*, 774 F.2d at 1188-1189.

[291] *See* Department of Veterans Affairs v. Federal Labor Relations Authority, 16 F.3d 1526, 1532 (9th Cir. 1994).

[292] *See supra* notes 43-50 and accompanying text.

[293] *See supra* notes 60-66 and accompanying text discussing the confidentiality provisions of the ADRA.

[294] *See Department of Veterans Affairs*, 16 F.3d at 1532.

ADRA provides unambiguous statutory authority for the agency to exclude the union from party caucuses with a mediator.[295]

The agency should defend its right to withhold final EEO settlement agreements it enters with individually identifiable complainants under the FOIA-Privacy Act analysis.[296] Although such documents are specifically excluded from confidentiality coverage under the ADRA, there is no indication in the language of the ADRA that Congress, by excluding those documents from ADRA coverage, intended to take away from other already existing statutory, regulatory, or precedentially created privacy rights.

2. *Draft 29 C.F.R. pt. 1614*

The EEOC has proposed to amend its regulations governing the processing of EEO complaints to "require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. The required pre-complaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR at all stages of the complaint process."[297]

The proposed changes, if imposed, would neither resolve nor significantly alter the analysis pertaining to the conflict between 5 U.S.C. § 7114(a)(2)(A) and the ADRA. The proposed change in EEO regulations would amend other procedures. However, only the amendments to the precomplaint processing of complaints is relevant to this Article. The proposed change requires EEO counselors to "advise aggrieved persons that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation."[298] Because the proposed change affects only precomplaint processing, the rationale from *Fresno Service Center* and the later cases distinguishing precomplaint activities from those that take place after a formal complaint of discrimination has been filed is still applicable. In sum, the proposed change, if implemented, will not change the analysis much.

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[295] This is assuming the employee has not requested the union to represent him.

[296] *See* National Air Traffic Controllers Ass'n, 51 F.L.R.A. 115, 119–120 (1995).

[297] Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8595 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

[298] Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8595.

3. *MSPB Settlement Discussions*

The agency may be able lawfully to exclude the union from settlement discussions with MSPB appellants, but its position in such cases will likely be less defensible than it is in EEO cases. The separate statutory mechanism theory supports an agency's decision to exclude the union from private caucuses during Air Force-conducted mediations of MSPB disputes. The separate statutory mechanism theory, born in the Ninth Circuit in *Fresno Service Center*, and then killed in the D.C. Circuit in *NTEU v. FLRA*, was partially resuscitated by the Authority in *Local 3882* in the "discussions pursuant to 'other statutes'" portion of the opinion, wherein the Authority held it must consider those other statutes when rights conferred under those statutes conflict with rights conferred under 5 U.S.C. § 7114(a)(2)(A).[299]

The separate statutory process argument, as applied to MSPB mediations, is even more persuasive when read in combination with the Ninth Circuit's discussion of congressionally encouraged settlement schemes and the newly introduced "formality preempting" factor, both raised by the court in *Department of Veterans Affairs*. The ADRA indicates a clear congressional intent favoring the use of ADR in employment-related disputes, including MSPB appeals.[300] Moreover, Air Force-conducted mediations are precisely the type of "effort[s] to preempt the formal process"[301] the court distinguished from witness interviews for MSPB hearings in that case. Finally, the Authority recognized in *Local 1594* that information about disciplinary and adverse actions pertaining to a specifically identifiable individual implicated significant privacy interests and should not be released to a union under a FOIA-Privacy Act

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[299] American Fed'n of Gov't Employees, Local 3882, 29 F.L.R.A. 584, 590 (1987).

[300] *See supra* note 48 and accompanying text. Agency counsel may be hard pressed to identify an MSPB rule or regulation encouraging settlement or "resolution" as unambiguously as do the EEOC case processing regulations. Nevertheless, anyone who has ever represented the agency or an appellant in an MSPB proceeding has no doubt felt "encouraged" to settle cases. All of the reasons that justify protecting a system that encourages settling EEO cases apply (for example, backed-up case loads and swamped administrative judges) equally in the MSPB context.

[301] Department of Veterans Affairs v. Federal Labor Relations Authority, 16 F.3d 1526, 1532 (9th Cir. 1994).

analysis.[302] In sum, considerable authority supports the agency's right, at the option of the appellant, to exclude the union from private caucuses during mediations involving MSPB appeals.[303]

Although the Authority's partial resuscitation of the separate statutory process theory in *Local 3882* can be read to stand for an agency's right lawfully to exclude the union from Air Force mediation of MSPB complaints, another part of the opinion appears squarely to hold that an agency may not do so. Specifically, the Authority held the union's 5 U.S.C. § 7114(a)(2)(A) representational right during management-employee discussions, although admittedly restricted in the case of employee statutory appeals, turned on one of three factors.[304] One of those factors was whether settlement deliberations were anticipated during the discussions;[305] if so, according to the Authority's reasoning, the union has a right to be present. The Authority's holding in that regard is in direct conflict with subsequently passed legislation, the ADRA.

The language in *Local 3882* conflicts with the ADRA because the Authority defined "discussion" for 5 U.S.C. § 7114(a)(2)(A) purposes to include settlement discussions. More specifically, it held the discussion that took place in that case (appellant's oral reply to proposed suspension) was

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[302] *See* American Fed'n of Gov't Employees, Local 1594, 51 F.L.R.A. 530, 536–537 (1995).

[303] *But cf. Department of Veterans Affairs*, 16 F.3d 1526; American Fed'n of Gov't Employees, Local 1857, 29 F.L.R.A. 594 (1987). In both cases, the Ninth Circuit and the Authority, respectively, drew a distinction between dispute resolution processes in which the union's institutional role is recognized by statute or formal agreement and dispute resolution processes in which the union has no such clearly defined role. In *Local 1857*, the Authority discussed the union's institutional role in being present for management interviews of witnesses in preparation for a grievance arbitration hearing, a process in which the union was integrally involved. *See Local 1857*, 29 F.L.R.A. at 598–599. In *Department of Veterans Affairs*, the court discussed the difference between a charge filed under Title VII, "a Congressional enactment unconnected to the [FSLMRS]" with a case in which an employee charge was filed (an MSPB appeal) pursuant to "a statute that Congress enacted to implement its finding that 'labor organizations and collective bargaining in the civil service are in the public interest.'" *Department of Veterans Affairs*, 16 F.3d at 1533 (quoting 5 U.S.C. § 7101(a) (1994)). In MSPB settlement cases, an agency counsel arguing the agency's right to exclude the union from such settlement discussions may be pressed for a basis to distinguish *Department of Veterans Affairs*, which seems directly applicable on this point, and *Local 1857*, which seems applicable by analogy. An agency counsel in such a position should argue the conflict between those decisions and the ADRA.

[304] *See Local 3882*, 29 F.L.R.A. at 590–591.

[305] *See id.* at 592.

not a 5 U.S.C. § 7114(a)(2)(A) discussion because settlement discussions were not anticipated;[306] by implication "settlement discussion" in ordinary parlance means "discussion" for purposes of 5 U.S.C. § 7114(a)(2)(A). The ADRA is specifically intended to encourage management and employees to, when you get right down to it, settle cases. In order to further that objective, the ADRA includes some very strict confidentiality provisions[307] that seem to fall right into place along side privacy rights the courts and the Authority have readily recognized in other contexts.[308] The upshot is whereas the Authority stated the union has a right to be present at MSPB settlement discussions, Congress has since specifically declared that certain settlement discussions are confidential (namely, those between a neutral and a party under the ADRA).

When deciding how to handle MSPB mediations, agency counsel should consider that, whether or not the union is present for discussions between the agency and an aggrieved employee, the courts and the Authority appear uniformly to agree that the agency is bound to bargain over any spillover impact the remedy has on bargaining unit interests.[309] Additionally, agency counsel should note that whereas the case law would support an argument that a union's institutional role in the context of EEO cases is limited to the right to bargain over spillover impact,[310] that same argument may not be so persuasive in other fora.[311]

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[306] *See id.*

[307] *See supra* notes 60-66 and accompanying text discussing the confidentiality provisions of the ADRA.

[308] *See generally* National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181 (D.C. Cir. 1985); IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019 (9th Cir. 1983); American Fed'n of Gov't Employees, Local 1594, 51 F.L.R.A. 530 (1995) (addressing a disciplined employee's privacy rights regarding disciplinary and adverse actions taken against him); National Air Traffic Controllers Ass'n, 51 F.L.R.A. 115 (1995) (addressing an EEO complainant's privacy rights); Columbia Typographical Union No. 101, 23 F.L.R.A. 35 (1986).

[309] *See NTEU v. FLRA*, 774 F.2d at 1189 ("Nonetheless, although the union's institutional role may be restricted, . . . we find that the words of § 7114(a)(2)(A), which provide . . . the right to be present at any formal discussion of a grievance[,] . . . assure the union a role in the alternative procedures so long as the statutory criteria of § 7114(a)(2)(A) are met."); National Treasury Employees Union, 29 F.L.R.A. 660, 664-665 (1987); *Local 3882*, 29 F.L.R.A. at 591.

[310] *See NTEU v. FLRA*, 774 F.2d at 1189; *Fresno Service Center*, 706 F.2d at 1023; *see also Columbia Typographical Union*, 23 F.L.R.A. at 38-39 (holding that no unlawful bypass occurred when the management negotiated directly with an EEO

4. *Witness Interviews*

According to Ninth Circuit's predecision/postdecision distinction in *Department of Veterans Affairs*, the agency may conduct investigatory witness interviews without affording the union an opportunity to be present.[312] But, once the agency has made a final determination about the matter it is investigating, the union has a right to be present at agency interviews of witnesses in preparation for MSPB hearings pursuant to 5 U.S.C. § 7114(a)(2)(A).[313] There are good arguments to be made regarding the negative impact such a rule has on the fairness of the adversarial process. For example, the rule, as held by the Ninth Circuit, affords a union the right to have a representative present at the agency counsel's interview of opposing witnesses in preparation for hearings before third parties, but affords the agency no similar right. The impact of such a rule on the attorney work product privilege is sweeping, and potentially devastating to agency counsel. According to such a rule, it will be virtually

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complainant in an effort to settle the complaint). In addition, the Authority has noted that in the private sector, courts have found the rights of individual EEO complainants superior to the rights of a union:

> For examples of similar conflicts in the private sector resolved in favor of the victim of discrimination over the exclusive representative, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50–51 (1973), which held that the individual's right to equal employment opportunities may not be waived in a collective bargaining agreement; *International Union of Electrical, Radio and Machine Workers v. NLRB*, 648 F.2d 18, 26–27 (D.C. Cir. 1980), involving an individual EEO complainant's paramount right to the privacy and confidentiality of his or her EEO complaint over an exclusive representative's demand for a copy of the complaint and the employee's identity; *Airline Stewards and Stewardesses Ass'n, Local 550, TWU, et al. v. American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973), concerning the right of individual class members in an EEO case to exclude themselves from class actions brought by their exclusive representative.

Id. at 39 n.5.

[311] *See NTEU v. FLRA*, 774 F.2d at 1189 n.12, 1192–1193 (holding that a union has the right to be present at an agency interview of a witness in an MSPB hearing and noting that the union's right to be present is most restricted in EEO cases); *see also* American Fed'n of Gov't Employees, Local 1857, 29 F.L.R.A. 594, 609 (1987) (holding that the union had a right to be present at an agency interview of a witness in preparation for a grievance arbitration). By implication, the union is less restricted in other fora.

[312] *See* Department of Veterans Affairs v. Federal Labor Relations Authority, 16 F.3d 1526, 1530 (9th Cir. 1994).

[313] *See id.*

impossible for agency counsel effectively and thoroughly to prepare a case without telegraphing every detail.[314]

The Ninth Circuit's decision applies directly to agency interviews of witnesses in preparation for MSPB hearings and almost certainly applies to agency interviews of witnesses in preparation for arbitration hearings. The still unanswered question is whether, according to the partially resuscitated separate statutory process theory, the same rule applies to witness interviews conducted in preparation for EEOC hearings. Analytically, the precedent does not fit. All of the judicial and Authority commentary on the supremacy of an EEO complainant's privacy rights comes up in cases involving settlement discussions, where the only parties to the discussion are the complainant (and perhaps the complainant's representative) and the agency. Once the facts move from that scenario to one involving discussions between management representatives and other employees in the workplace, the analysis is more difficult. On one hand, by electing to take his complaint to a hearing, the complainant is virtually guaranteed to give up a significant portion of his. otherwise protectable privacy right because the agency counsel has a right to interview witnesses about all the facts and circumstances surrounding his complaint, as well as a right to probe into other very personal areas, such as the employee's medical and mental health history, financial situation, and more. Additionally, the union's institutional role of preventing coercion and intimidation of bargaining unit member witnesses in preparation for third-party hearings in the EEO context[315] may be tough to distinguish from witness questioning in preparation for MSPB hearings or grievance arbitrations.

On the other hand, it is not difficult to conceive of a situation in which the interests of the EEO complainant and the union diverge sufficiently[316] such that allowing the union to be present might place the EEO complainant and any witnesses supporting the complainant in the position of facing two adversaries instead of only one. Consider, for example, a case involving a female employee's assertion of hostile environment sexual harassment, wherein she is the only female in a section of fifteen employees. Assuming she and the two witnesses who support her allegations can provide information that, if substantiated, may lead to adverse actions against other

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[314] *See* Drenan, *supra* note 71, at 193.

[315] *See NTEU v. FLRA*, 774 F.2d at 1192-1193; *Local 1857*, 29 F.L.R.A. at 598.

[316] As contemplated by the D.C. Circuit in footnote 12 of *NTEU v. FLRA*. *See NTEU v. FLRA*, 774 F.2d at 1189 n.12.

bargaining unit members in the section, including the shop steward, her interests would obviously be at odds with the union's.[317]

On facts like these, most of the language the courts and the Authority have used when describing the comparative rights of EEO complainants and unions would seem to support an agency's right to exclude the union from witness interviews it conducts in preparation for EEO hearings. For example, consider the following: the Authority is owed no deference in Title VII matters;[318] preserving EEO complainants' confidentiality serves an important public interest;[319] EEO complaints are processed according to a separate statutory process;[320] the rights of an EEO complainant trump the rights of the union when there is a conflict;[321] witness interviews are not settlement discussions that would implicate any union interest based on spillover impact;[322] the union's role is obviously limited in statutory employee appeal procedures;[323] and unsanitized information about the facts and circumstances surrounding an identifiable EEO complainant's case implicates significant privacy interests.[324]

However, while there may be some support for expanding the sanctity of the EEO process from agency settlement discussions with individual complainants to agency witness interviews of people with knowledge of the facts surrounding those complaints, precedent is only marginally applicable. The "no deference" argument does not fit neatly because unlike the informal adjustment of complaints the Ninth Circuit encountered in *Fresno*

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[317] Consider also a case in which a complainant seeks, as a settlement term, priority placement in a position ahead of other bargaining unit members with more seniority. *See* National Treasury Employees Union, 29 F.L.R.A. 660, 674 (1987) (stating that the EEO complainant wanted to be permanently transferred to another job); *cf. NTEU v. FLRA*, 774 F.2d at 1188 (discussing how "a benefit or opportunity granted to one employee can mean the loss of the same benefit or opportunity for another employee").

[318] *See* IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019, 1024 (9th Cir. 1983).

[319] *See id.*

[320] *See id.* at 1025; American Fed'n of Gov't Employees, Local 3882, 29 F.L.R.A. 584, 590 (1987).

[321] *See NTEU v. FLRA*, 774 F.2d at 1186–1187; *Fresno Service Center*, 706 F.2d at 1025; Columbia Typographical Union No. 101, 23 F.L.R.A. 35, 38 (1986).

[322] *See Local 3882*, 29 F.L.R.A. at 591–592.

[323] *See id.* at 590.

[324] *See* National Air Traffic Controllers Ass'n, 51 F.L.R.A. 115, 122–123 (1995).

Service Center,[325] witness interviews by agency counsel in preparation for a hearing are neither unique to the EEO complaint process nor covered by any EEO regulation. Regarding confidentiality, by the time a complainant's case is going to a hearing, she has already given up most, if not all, confidentiality regarding the facts and circumstances surrounding her allegations. Likewise, it would be a stretch to argue that allowing the union to be present during witness interviews would conflict with the complainant's Title VII rights because those rights, as described by the courts and the Authority, all involve some element of confidentiality in the process, and confidentiality is for practical purposes forfeited by the process by the time the case goes to a hearing.[326] Finally, unlike settlement discussions with an identifiable complainant, interviews of noncomplainant witnesses entangle an important institutional union role: preventing the coercion or intimidation of witnesses.[327] By the time an EEO case goes to a hearing, the agency has long since completed its investigation. Therefore, according to the Ninth Circuit's decision in *Department of Veterans Affairs* (drawing a predecision/postdecision distinction) the union has a 5 U.S.C. § 7114(a)(2)(A) right to be present at such interviews.[328]

B. *Theoretical Issues*

In the grand scheme of things, and apart from the countless arguments a skilled advocate could make based on case law, it is useful to consider what public interests may or may not be furthered when balancing the union's rights against the rights of an aggrieved employee. Although the explosion in recent years of employment-related litigation bodes well for labor and employment lawyers,[329] the rest of the non-brief-writing, non-

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[325] *See Fresno Service Center*, 706 F.2d at 1023–1024.

[326] EEOC administrative hearings "are part of the investigative process and are thus closed to the public." 29 C.F.R. § 1614.109(c) (1998). But the practical aspect of interviewing witnesses effectively opens up, at least to those witnesses, the facts and circumstances surrounding a complainant's allegations.

[327] *See* cases cited *supra* note 315.

[328] *See* Department of Veterans Affairs v. Federal Labor Relations Authority, 16 F.3d 1526, 1530 (9th Cir. 1994); *see also* American Fed'n of Gov't Employees, Local 1857, 29 F.L.R.A. 594, 598–599 (1987).

[329] *See* COMMISSION REPORT, *supra* note 8, at 25 ("Employment litigation is a costly option for both employers and employees. For every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims.").

motion-filing, or non-issue-spotting public seems to consider all that litigation to be a bad thing.[330] It is costly and time consuming. And the process itself, which quite often takes on a life of its own once initiated, is not at all well-suited to filtering out the cases that really do not need to be resolved by a judge or jury. For that very reason, an increasing number of courts are imposing, as a prerequisite to litigation, a requirement that parties to a dispute at least attempt some form of ADR before they can have their day (or perhaps days, weeks, or longer) in court.[331]

When parties resort to using ADR, where interest-based bargaining instead of position-based bargaining is allowed to flourish, a significant number of employment-related disputes are not only resolved very early in the process, they are resolved in a fashion that is actually beneficial to the working relationship between the parties.[332] Mediation works because the parties are free to explore creative ways to resolve disputes without being bound by the strictures of the formal litigation process. As a general rule, the less formality, the better the process works.

The problem is, at least as applied to settlement discussions, 5 U.S.C. § 7114(a)(2)(A) has been interpreted to allow the union to interject formality (by insisting on participating in discussions which would otherwise take place privately between the aggrieved employee and the employer)[333] where such formality is demonstrably counterproductive[334] and contrary to the public good. It has never been suggested—at least to this author's understanding—and is certainly not suggested here, that

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[330] *See id.*

> [A]side from the direct costs of litigation, employers often dedicate significant sums to designing defensive personnel practices (with the help of lawyers) to minimize their litigation exposure. These costs tend to affect compensation: as the firm's employment law expenses grow, less resources are available to provide wage and benefits to workers.

Id.

[331] *See* Frank E. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 885-886 (1996).

[332] *See supra* notes 24–26 and accompanying text.

[333] *See, e.g., Local 1857*, 29 F.L.R.A. 594 (holding that 5 U.S.C. § 7114(a)(2)(A) discussions entitle the union to be present and thereby permitting the union to interject formality).

[334] *See* COMMISSION REPORT, *supra* note 8, at 25 (noting the financial burden that employment litigation places on employers and employees). "Employment litigation is a costly option for both employers and employees. For every dollar paid to employees through litigation, at least another dollar is paid to [the] attorneys involved . . . ." *Id.*

unions have no business at all in the settlement of employee statutory appeals. Indeed, the courts and the Authority uniformly agree that the agency is always obligated to bargain with the union over any impact a settlement has on bargaining unit interests (referred to in this Article as spillover).[335]

Because the agency is always obligated to bargain over impact, the union's position would not appreciably be worsened if it were excluded from settlement discussions entirely. The courts and the Authority have already conceded that in the case of a conflict between Title VII settlements and the union's interests, the union's rights are subordinated to those of an identifiable victim of discrimination.[336] In Title VII cases, the theoretical conflict between the discriminatee's rights and the union's rights seems to have been resoundingly resolved in favor of the individual discriminatee.[337] Considering the public interest served by Title VII (eliminating discrimination based on race, sex, nationality, or religion)[338] when compared to the public interest served by "a statute that Congress enacted to implement its finding that 'labor organizations and collective bargaining in the civil service are in the public interest,'"[339] it makes sense to tip the balance in favor of protecting the identifiable discriminatee over the more amorphous public interest in collective bargaining.

In MSPB settlement cases the agency is also bound to bargain over impact of the settlement on bargaining unit interests. The public interest in collective bargaining would not be completely forsaken if an individual appellant's settlement discussions with the agency were held in confidence. Additionally, the public interest in reducing the costs associated with resolving employment-related disputes and conserving judicial resources mitigates in favor of guarding that aspect of the ADR process that allows it to work—confidentiality. The unions could reasonably argue there is a big difference between, to put it in simple terms, "asking for permission" and

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335 *See* cases cited *supra* note 309.

336 *See* National Treasury Employees Union v. Federal Labor Relations Authority, 774 F.2d 1181, 1189 n.12 (D.C. Cir. 1985); Columbia Typographical Union No. 101, 23 F.L.R.A. 35, 39 (1986) (citing *NTEU v. FLRA*, 774 F.2d at 1189 n.12).

337 *See* cases cited *supra* note 309.

338 Disability and age are now similarly protected under the Rehabilitation Act, 29 U.S.C. § 790 (1994), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1994), respectively. *See* 29 C.F.R. § 1614.103(a) (1998).

339 Department of Veterans Affairs v. Federal Labor Relations Authority, 16 F.3d 1526, 1533 (9th Cir. 1994) (quoting 5 U.S.C. § 7101(a) (1994)).

"asking for forgiveness."[340] Fortunately, the Air Force mediation model accommodates both the public interest in favor of ADR and the union's interest in being involved in the decisionmaking process.

According to the ADRA confidentiality provisions,[341] as applied to the Air Force mediation model, only a party's private caucuses with the mediator are protected. Guaranteeing those sessions remain confidential will allow the unfettered exploration of interest-based bargaining by the parties, ensuring the benefits achievable through the mediation process are still within reach. Although the ADRA falls short of dictating confidentiality at other points in the mediation process, such as during joint discussions, the clear weight of judicial and Authority precedent holds an EEO complainant's right to privacy to be superior to the union's right to be present.

VI. CONCLUSION

Experience clearly demonstrates that using mediation and other ADR techniques serves the public good. Using ADR is efficient and allows the parties to focus on what is important to them without having to pigeon-hole their concerns into a specific legal theory of their respective cases. Mediation will continue to be an effective way to resolve employment-related disputes in the Air Force as long as the confidentiality of private caucuses between the mediator and the parties is strictly protected.

In EEO cases, case law prior to the passage of the ADRA soundly established the right of an EEO complainant to elect to exclude the union from her settlement discussions with management. Since passage of the ADRA, the sanctity of an EEO complainant's right to privacy in settlement discussions is even more clear, and MSPB appellant settlement discussions, conducted pursuant to the terms of the ADRA, should also be held to be beyond the reach of 5 U.S.C. § 7114(a)(2)(A).

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[340] In other words, the unions could argue that the difference lies in (1) being present and involved when settlement options are being explored and discussed and (2) being consulted after a settlement has already been reached and asked to find a way to live with it.

[341] *See supra* notes 60-66 and accompanying text discussing the confidentiality provisions of the ADRA.